No. 17-778	
Title:	**Jamar Alonzo Quarles, Petitioner** **v.** **United States**
Docketed:	November 28, 2017
Linked with 17A296	
Lower Ct:	United States Court of Appeals for the Sixth Circuit
Case Numbers:	(16-1690)
Decision Date:	March 10, 2017
Rehearing Denied:	June 28, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Sep 13 2017	Application (17A296) to extend the time to file a petition for a writ of certiorari from September 26, 2017 to November 24, 2017, submitted to Justice Kagan.
Sep 15 2017	Application (17A296) granted by Justice Kagan extending the time to file until November 24, 2017.
Nov 24 2017	Petition for a writ of certiorari filed. (Response due December 28, 2017) **Petition** **Appendix** **Certificate of Word Count** **Proof of Service**
Dec 19 2017	Motion to extend the time to file a response from December 28, 2017 to January 29, 2017, submitted to The Clerk. **Main Document**
Dec 20 2017	Motion to extend the time to file a response is granted and the time is extended to and including January 29, 2018.
Dec 28 2017	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 17 2018	Motion to extend the time to file a response from January 29, 2018 to February 28, 2018, submitted to The Clerk. **Main Document**
Jan 18 2018	Motion to extend the time to file a response is granted and the time is further extended to and including February 28, 2018.

Feb 22 2018	Motion to extend the time to file a response from February 28, 2018 to March 30, 2018, submitted to The Clerk. **Main Document**
Feb 23 2018	Motion to extend the time to file a response is granted and the time is further extended to and including March 30, 2018.
Mar 30 2018	Brief of respondent United States of America filed. **Certificate of Word Count** **Main Document**
Apr 06 2018	Waiver of the 14-day waiting period under Rule 15.5 filed by petitioner. **Main Document**
Apr 10 2018	Reply of petitioner Jamar Quarles filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 11 2018	DISTRIBUTED for Conference of 4/27/2018.
Dec 13 2018	Supplemental brief of petitioner Jamar Quarles filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 20 2018	DISTRIBUTED for Conference of 1/4/2019.
Jan 07 2019	DISTRIBUTED for Conference of 1/11/2019.
Jan 11 2019	Petition GRANTED.
Feb 11 2019	SET FOR ARGUMENT on Wednesday, April 24, 2019
Feb 20 2019	Joint appendix filed. **Main Document** **Proof of Service**
Feb 20 2019	Brief of petitioner Jamar Quarles filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 27 2019	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 27 2019	Brief amici curiae of Federal Public Defenders for the Northern, Western, and Southern Districts of Texas filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 20 2019	CIRCULATED
Mar 20 2019	Record requested from the U.S.C.A. 6th Circuit.

Mar 20 2019	Record received from the U.S.C.A. 6th Circuit is electronic.
Mar 22 2019	Brief of respondent United States filed. (Distributed) **Main Document** **Certificate of Word Count**
Apr 15 2019	Reply of petitioner Jamar Quarles filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 24 2019	Argued. For petitioner: Jeremy C. Marwell, Washington, D. C. For respondent: Zachary D. Tripp, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
Jun 10 2019	Adjudged to be AFFIRMED. Kavanaugh, J., delivered the **opinion** for a unanimous Court. Thomas, J., filed a concurring opinion.

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No.

In the Supreme Court of the United States

JAMAR ALONZO QUARLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Armed Career Criminal Act, 18 U.S.C. § 924(e), imposes a mandatory fifteen-year prison term upon any convicted felon who unlawfully possesses a firearm and who has three or more prior convictions for any "violent felony or * * * serious drug offense." The definition of a "violent felony" includes a burglary conviction that is punishable by imprisonment for a term exceeding one year. See § 924(e)(2)(B)(ii). In *Taylor* v. *United States*, 495 U.S. 575 (1990), this Court held that § 924(e) uses the term "burglary" in its generic sense, to cover any crime "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 598-599.

The question presented is:

Whether (as two circuits hold) *Taylor*'s definition of generic burglary requires proof that intent to commit a crime was present at the time of unlawful entry or first unlawful remaining, or whether (as the court below and three other circuits hold) it is enough that the defendant formed the intent to commit a crime at any time while "remaining in" the building or structure.

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OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-8a, is reported at 850 F.3d 836.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 2017, and a timely petition for rehearing en banc was denied on June 28, 2017. On September 13, 2017, Justice Kagan extended the time in which to file a petition for writ of certiorari to and including November 24, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the Appendix.

INTRODUCTION

The Armed Career Criminal Act (ACCA) imposes a mandatory 15-year sentencing enhancement on any convicted felon who unlawfully possesses a firearm and who has three or more prior convictions for any "violent felony or * * * serious drug offense." ACCA defines a "violent felony," in relevant part, as any crime "punishable by imprisonment for a term exceeding one year" that "is burglary." 18 U.S.C. § 924(e)(2)(B)(ii). This Court has held that ACCA uses the term "burglary" in its generic sense, meaning it has the "basic elements of [1] unlawful or unprivileged entry into, or remaining in, [2] a building or structure, [3] with intent to commit a crime." *Taylor* v. *United States*, 495 U.S. 575, 599 (1990).

There is a deep and entrenched "circuit split on the question of whether an intent to commit a crime must be present at the moment one unlawfully enters

or remains in a building." Gov't Mot. to Stay Mandate Pending Filing of Pet. for Writ of Cert. 5, *United States* v. *Morris*, 850 F.3d 925 (8th Cir. 2017) (No. 14-3336) (*Morris* Gov't Stay Mot.). Both the Fifth and Eighth Circuits have correctly concluded that *Taylor* requires a showing that the defendant had criminal intent when he or she unlawfully entered or first unlawfully remained inside the building. Put simply, these circuits require "contemporaneous intent." *United States* v. *McArthur*, 850 F.3d 925, 939 n.* (8th Cir. 2017). The Fourth, Sixth, Ninth, and Tenth Circuits have reached the opposite conclusion, transforming any trespass into a burglary if the defendant decides at any point to commit a crime. Moreover, this split is unlikely to resolve itself, with circuits solidifying their positions in recent years. As the government acknowledged in opposing en banc review in this case, "if a midstream correction is needed, it is needed elsewhere." Gov't Resp. to Reh'g Pet. 10.

The time has come for this Court to make that "midstream correction." As the United States itself has explained, this is a question "of extraordinary importance to the federal sentencing structure" because the "[c]ircuit split gravely undermines the uniform application of the [ACCA]'s enhanced sentencing provisions," causing sentencing disparities for burglary, "a frequently-used ACCA predicate." Gov't Pet. for Reh'g En Banc, *United States* v. *Morris*, 836 F.3d 931 (8th Cir. 2016) (No. 14-3336) (*Morris* Gov't Reh'g Pet.). The decision below was incorrect. By not requiring contemporaneous intent, the Sixth Circuit allows a fifteen-year enhancement to be imposed based on a predicate conviction that required mere trespass with a subsequent crime. This reading dis-

regards the language of *Taylor*, which requires that the defendant have intent to commit a crime at the time unlawful occupation begins. It also ignores the authorities on which this Court relied in *Taylor* (including Congress' purpose in enacting the statute), which emphasized that contemporaneous intent is a key reason that generic burglary is understood to carry an inherent risk of violence. By reversing the decision below, this Court can resolve a deep split that has led to the "splinter[ed] application" of ACCA, ensure that the use of this severe enhancement conforms to this Court's precedents and congressional intent, and prevent further injustice to criminal defendants.

STATEMENT

1. In 1984, Congress enacted the Armed Career Criminal Act (ACCA). Pub. L. No. 98-473, ch. 18, 98 Stat. 2185, 18 U.S.C. App. § 1202(a) (1982 ed., Supp. III). The law imposed a mandatory fifteen-year prison term upon any convicted felon who unlawfully possessed a firearm and who had three or more prior convictions for robbery or burglary. *Ibid.* The statute defined burglary as "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." § 1202(c)(9).

Congress enacted the provision because of concerns about "the large proportion of crimes committed by a small number of career offenders, and the inadequacy of state prosecutorial resources to address this problem." *Taylor* v. *United States*, 495 U.S. 575, 583 (1990). In particular, the 1984 Congress "singled out burglary (as opposed to other frequently committed

property crimes such as larceny and auto theft) for inclusion as a predicate offense * * * because of its inherent potential for harm to persons." *Id.* at 588. Not only does the offender's entrance into a building "often create[] the possibility of a violent confrontation between the offender and an occupant," but the fact that the offender enters "aware[] of this possibility may mean that he is prepared to use violence if necessary to carry out his plans." *Ibid.*

In 1986, Congress amended ACCA to expand the predicate offenses triggering the sentence enhancement from simply "robbery or burglary" to any "violent felony or * * * serious drug offense." Pub. L. No. 99-570, § 1402, 100 Stat. 3207–39 (codified as amended at 18 U.S.C. § 924(e)). The amended statute defined a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that also "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii). At the same time, Congress deleted the statutory definition of burglary.

In *Taylor*, this Court addressed the meaning of the term "burglary" in the absence of a statutory definition. The Court held that, as used in § 924(e), "burglary" refers to "the generic sense in which the term is now used in the criminal codes of most States." 495 U.S. at 598. Generic burglary includes any crime, "regardless of its exact definition or label, having the basic elements of unlawful or unprivileged

entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599.[1]

To find that a predicate offense qualifies as generic burglary for the purposes of § 924(e), a court must use a "categorical approach," which "focus[es] solely on whether the elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the particular facts of the case." *Mathis* v. *United States*, 136 S. Ct. 2243, 2248 (2016). A crime cannot qualify as an ACCA predicate if its elements are broader than those of the generic offense. *Id.* at 2251. This is true "even if [the defendant's] conduct fits within the generic offense." *Ibid.* In such a case, "the mismatch of elements saves the defendant from an ACCA sentence." *Ibid.* This elements-focused approach avoids unfairness to defendants. In *Mathis*, this Court explained that:

> Statements of "non-elemental fact" in the records of prior convictions are prone to error precisely because their proof is unnecessary. At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law[.] * * * When that is true, a prosecutor's or judge's mistake as to means, reflected in the record, is likely to go uncorrected. Such inaccuracies should not come back to haunt the defendant

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[1] Numerous circuits have relied on *Taylor*'s definition of generic burglary in interpreting the term "crime of violence" under the career offender provision of the U.S. Sentencing Guidelines § 4B1.1 (2016), whose definition is "identical to those found in the Armed Career Criminal Act * * * except that the statutory definition leaves out 'of a dwelling.'" *United States* v. *Evans*, 576 F.3d 766, 767 (7th Cir. 2009) (per curiam).

> many years down the road by triggering a lengthy mandatory sentence.

136 S. Ct. at 2253.

When a single statute lists elements in the alternative, this Court has approved use of a "modified categorical approach," under which sentencing courts can look to a limited class of documents to determine the version of the crime of which the defendant was convicted, and its basic elements.[2] *Mathis*, 136 S. Ct. at 2249. When the predicate offense was decided by a jury, the sentencing court may look to the charging document and jury instructions. *Taylor*, 495 U.S. at 602. When the predicate offense results from a guilty plea, the sentencing court may look to "the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Shepard* v. *United States*, 544 U.S. 13, 26 (2005).

The class of approved documents is necessarily limited to those "approaching the certainty of the record of conviction" so that the sentencing judge can avoid making a disputed finding of fact that implicates Sixth Amendment concerns. *Shepard*, 544 U.S. at 23-25 ("[A]ny fact other than a prior conviction sufficient to raise the limit of the possible federal sen-

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[2] Although petitioner argued below that his conviction under Mich. Comp. Law § 750.110a(4) does not constitute a conviction for generic burglary under the modified categorical approach, neither the District Court nor the Sixth Circuit had occasion to reach the issue, having resolved his challenge on the threshold question presented here.

tence must be found by a jury, in the absence of any waiver of rights by the defendant.") (citing *Jones* v. *United States*, 526 U.S. 227, 243 n.6 (1999)).

2. a. Petitioner Jamar Quarles pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). R.21. Before his guilty plea, petitioner sought the court's determination whether a prior conviction for Home Invasion in the Third Degree under Michigan law constituted a "violent felony" for the purposes of ACCA. R.15. The Michigan statute reads, in relevant part:

> A person is guilty of home invasion in the third degree if the person * * *
>
> (a) Breaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor.

Mich. Comp. Law § 750.110a(4). The court declined to make that determination before sentencing. R.19 at 65. Petitioner pleaded guilty.

b. At sentencing, petitioner's final presentence report identified only three convictions as crimes of violence, including petitioner's Michigan conviction for Home Invasion in the Third Degree. R.25 at 102. Petitioner argued that the Michigan conviction does not satisfy the elements of generic burglary as required by *Taylor* and thus does not qualify as a "vio-

lent felony" under ACCA.[3] R.50 at 377 (Sentencing Memorandum). Petitioner contended that § 750.110a(4) lacks the requisite *Taylor* elements because it does not require proof of intent to commit a crime at the moment the defendant entered or first unlawfully remained inside the building. *Ibid.*

The district court concluded that a conviction under § 750.110a(4)(a) constitutes generic burglary under ACCA, R.60 at 437, and on May 16, 2016, sentenced petitioner to 204 months' imprisonment. R.57 at 405. The court recognized, however, that "the cases go[] in many different directions," and that whether generic burglary requires proof of contemporaneous intent "isn't going to be settled here and * * * whoever wins needs to take it up and get it resolved in the Sixth Circuit, because * * * there's room to argue both directions." R.60 at 432, 437.

c. The court of appeals affirmed. App., *infra*, 1a-8a. The court acknowledged that "[t]he question of whether generic burglary requires intent at entry has resulted in a circuit split * * * [that] hinges on whether the 'remaining in' language allows for the development of intent at any point or whether the intent must exist" at the time the defendant enters or first unlawfully remains inside the building. *Id.* at 7a. But according to the court of appeals, "someone who enters a building or structure and, while inside, commits or attempts to commit a felony will neces-

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[3] The District Court originally ruled that petitioner's Michigan conviction was a violent felony under ACCA's residual clause. R.40 at 256. Petitioner successfully appealed, and the Sixth Circuit remanded for resentencing under *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). See R.43.

sarily have remained inside the building or structure to do so." *Id.* at 8a. Thus, the court held that "generic burglary * * * does not require intent at entry." *Ibid.*

Petitioner sought rehearing en banc. Pet. for Reh'g En Banc. Petitioner maintained that generic burglary requires intent to be formed at the time the person unlawfully enters or first unlawfully remains in the building, and argued that the panel's decision brought the Sixth Circuit into conflict with decisions of the Fifth and Eighth Circuits. *Id.* at 7-11. Although the government conceded that "a circuit split exists as to whether generic burglary requires intent to commit a crime" at the time of unlawful entry or remaining, it argued that rehearing en banc was not warranted because a change of position by the Sixth Circuit could not eliminate the split. Gov't En Banc Opp. at 6. The Sixth Circuit summarily denied the petition. App., *infra*, 9a-10a.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Exacerbates An Entrenched Circuit Split

In holding that a prior conviction can serve as an ACCA predicate if the defendant developed the intent to commit a crime at any point "while 'remaining in'" a building, the Sixth Circuit has confirmed an established rift among the circuit courts. App., *infra*, 8a. While that decision accords with Fourth, Ninth, and Tenth Circuit rulings, it directly contravenes precedent of the Fifth and Eighth Circuits, which require criminal intent contemporaneous with the unlawful entry or decision to remain in the building.

The Sixth Circuit expressly recognized in this case that "[t]he question of whether generic burglary requires intent at entry has resulted in a circuit split focusing on *Taylor*'s 'remaining in' language." App., *infra*, 7a. Other circuits have likewise acknowledged this pervasive split, noting "two competing views" over "the meaning of the phrase 'remaining in.'" *United States* v. *Bernel-Aveja*, 844 F.3d 206, 215 (5th Cir. 2016) (Higginbotham, J., concurring in the judgment); see also *id.* at 243 (Owen, J., concurring) (noting "division among the Circuit Courts * * * as to when the intent to commit a crime on the premises must be formed"). Indeed, the government conceded here that "a circuit split exists as to whether generic burglary requires intent to commit a crime at entry, or if intent may arise at any time when the perpetrator is unlawfully present." Gov't En Banc Opp. at 6; see also *Morris* Gov't Stay Mot. at 5 (noting "circuit split on the question of whether an intent to commit a crime must be present at the moment one unlawfully enters or remains in a building"). This Court should grant review in order to restore "fundamental fairness" by ensuring that "the same type of conduct is punishable on the Federal level in all cases." *Taylor* v. *United States*, 495 U.S. 575, 582 (1990) (quoting S. Rep. No. 190, 98th Cong., 1st Sess. 20 (1983)).

A. Two Circuits Have Held That *Taylor* Requires Contemporaneous Intent

The Fifth and Eighth Circuits have held that, to satisfy *Taylor*'s definition of generic burglary, a statute must require proof that the defendant intended to commit a crime at the time of unlawful entry or first unlawful remaining in a building. See, *e.g.*, *United States* v. *McArthur*, 850 F.3d 925 (8th Cir. 2017);

United States v. *Constante*, 544 F.3d 584 (5th Cir. 2008) (per curiam).

In *Constante*, 544 F.3d at 587, the Fifth Circuit "definitively * * * conclude[d]" that the defendant's convictions under the Texas burglary statute[4] were not "violent felonies" under ACCA since the statute "d[id] not contain an element of intent to commit a felony, theft, or assault at the moment of entry." Similarly, the court ruled in *United States* v. *Herrera-Montes*, 490 F.3d 390 (5th Cir. 2007), that the Tennessee burglary statute[5] was not subject to the Sentencing Guidelines' career offender enhancement for "crime[s] of violence," Sentencing Guidelines § 2L1.2, whose definition "'closely tracks' [ACCA's] definition of 'violent felony,'"[6] *Constante*, 544 F.3d at 586 (quoting *James* v. *United States*, 550 U.S. 192, 206 (2007)). The *Herrera-Montes* court reasoned that, since "*Taylor* requires that the defendant intend to commit a crime at the time of unlawful entry or remaining in," the statute failed to satisfy the generic definition of

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[4] Tex. Penal Code Ann. § 30.02(a)(3) (West 2011) (person commits burglary if "without the effective consent of the owner, the person * * * enters a building or habitation and commits or attempts to commit" a crime).

[5] Tenn. Code Ann. § 39-14-402(a)(3) (2014) (person commits burglary who "without the effective consent of the property owner * * * [e]nters a building and commits or attempts to commit" crime).

[6] The Fifth Circuit "treats cases dealing with the career offender guideline 'interchangeably' with cases dealing with [ACCA]." *United States* v. *Wilson*, 622 F. App'x 393, 404 (5th Cir. 2015) (per curiam) (quoting *United States* v. *Moore*, 635 F.3d 774, 776 (5th Cir. 2011) (per curiam)) (applying *Constante* to hold that Tex. Penal Code Ann. § 30.02(a)(3) also does not qualify as a crime of violence under Sentencing Guidelines § 4B1.1 (2015)).

burglary because it did not require contemporaneous intent. 490 F.3d at 392. As the court explained, to assume that "intent could be formed anytime" would be a radical expansion of the common meaning of burglary because "then every crime committed after an unlawful entry or remaining in would be burglary." *Id.* at 392 n.1.

Most recently, in *Bernel-Aveja*, 844 F.3d at 212, the Fifth Circuit, in a decision by Judge Priscilla Owen, reaffirmed that "the generic definition of burglary * * * in *Taylor v. United States* 'requires that the defendant intend to commit a crime at the time of unlawful entry or remaining in.'" Because Ohio law permitted a burglary conviction based on a "find[ing] that the defendant unlawfully entered a dwelling and thereafter formed the intent to commit a crime," *id.* at 214, the Fifth Circuit held that the Ohio burglary statute "[was] overly broad because it [was] not congruent with generic burglary." *Ibid.*[7]

The decision elicited concurrences from Judge Patrick Higginbotham and Judge Priscilla Owen, who disputed whether *Herrera-Montes* had resolved the issue correctly. Judge Higginbotham argued that "the act of 'remaining in' occurs at a discrete point in time, and to constitute burglary, the perpetrator

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[7] Incorporating the elements of "criminal trespass," the Ohio burglary statute provides in pertinent part: "No person, by force, stealth, or deception, shall * * * [without privilege to do so, knowingly enter *or remain* on the land or premises of another] in a permanent or temporary habitation of any person * * * with purpose to commit in the habitation any misdemeanor that is not a theft offense." *Bernel-Aveja*, 844 F.3d at 210 (quoting Ohio Rev. Code Ann. §§ 2911.12(A)(2), 2911.21(A)(1) (West 1990) (emphasis added) (amended 1996)).

must have intended to commit a further crime at that discrete point." *Id.* at 215. To suggest that "remaining in" encompasses "every crime committed while trespassing inside a building, regardless when intent to commit that crime was formed" would render superfluous the "unlawful entry" prong of generic burglary since, under this view, "every unlawful entry becomes unlawful remaining in immediately on entry." *Id.* at 218. Moreover, Judge Higginbotham contended that this overbroad approach would "dispense with the most fundamental character of burglary: that the perpetrator trespass while already harboring intent to commit a further crime." *Id.* at 218.

"Because of the importance of the issue," Judge Owen concurred separately in her panel opinion to argue that the rule set forth in *Herrera-Montes* "[wa]s not supported by the Supreme Court's opinion in *Taylor*." *Id.* at 219-220. Recognizing "a split among the Circuit Courts" on this very issue, Judge Owen urged the court to "join the Fourth and Ninth Circuits" in concluding that "intent to commit a crime * * * can be formed before or after the trespass initially occurs." *Id.* at 221. Since the Ohio statute explicitly contained a "remaining in" provision, Judge Owen posited that intent to commit a crime at the time of unlawful entry was not required. Instead, a defendant could develop criminal intent at any point during the trespass. *Id.* at 224-225.

The Eighth Circuit likewise recognized in *McArthur*, 850 F.3d at 939, that generic burglary "requires intent to commit a crime at the time of the unlawful or unprivileged entry or the initial 'remaining in' without consent." Writing for the court, Judge Steven Colloton explained that "[t]he act of 'remaining

in' a building, for purposes of generic burglary, is not a continuous undertaking," but a "discrete event that occurs at the moment when a perpetrator, who at one point was lawfully present, exceeds his license and overstays his welcome." *Id.* at 939. "If the defendant does not have the requisite intent at the moment he 'remains,' then he has not committed the crime of generic burglary." *Ibid.* The court thus determined that the defendant's conviction under Minnesota's third-degree burglary statute[8] did not support an ACCA sentencing enhancement because the statute "d[id] not require that the defendant have formed the 'intent to commit a crime' at the time of the nonconsensual entry or remaining in." *Id.* at 940.

Although the Eleventh Circuit has yet to consider the issue, one of its constituent district courts relied on Fifth Circuit precedent in holding that convictions under Tex. Penal Code Ann. § 30.02(a)(3) were "not violent felonies under the enumerated clause of the ACCA" because the statute "d[id] not contain the element of specific intent required to meet the definition of generic burglary." *United States* v. *Munoz-Morales*, No. 3:10-cr-80, 2016 WL 4424975, at *6 (N.D. Fla. July 11, 2016), *report and recommendation adopted*, 2016 WL 4414801 (N.D. Fla. Aug. 17, 2016).

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[8] Minn. Stat. § 609.582, subd. 3 (2016) (whoever "enters a building without consent and steals or commits a felony or gross misdemeanor while in the building * * * commits burglary in the third degree").

B. Four Other Circuits Maintain That *Taylor* Permits Sentence Enhancement Even When Contemporaneous Intent Is Not Required

In sharp contrast, the Fourth, Sixth, Ninth, and Tenth Circuits have interpreted *Taylor*'s "remaining in" language broadly to apply to a defendant who forms the intent to commit a crime at any point when trespassing in a building.

In *United States* v. *Priddy*, 808 F.3d 676 (2015), the Sixth Circuit ruled that the Tennessee burglary statute—the same provision at issue in *Herrera-Montes*—qualified as an ACCA predicate offense because it was a "'remaining-in' variant of generic burglary." *Id.* at 685. In the court's view, "someone who enters a building or structure and, while inside, commits or attempts to commit a felony will necessarily have remained inside the building or structure to do so." *Ibid.* Following *Priddy*, the Sixth Circuit held below that generic burglary "does not require intent at entry; rather the intent can be developed while 'remaining in.'" App., *infra*, 8a. Furthermore, the court viewed *Taylor*'s "remaining in language" as not referring to a discrete moment in time. *Ibid.* Instead, in the Sixth Circuit's view, it "allows for the development of intent at any point" while the defendant trespasses on the premises. *Id.* at 7a.[9]

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[9] The Sixth Circuit recently held that the Tennessee burglary statute is overbroad because it includes entry into locations such as trailers, tents, and vehicles. *United States* v. *Stitt*, 860 F.3d 854, 860 (2017) (en banc). That court has since confirmed that "nothing in *Stitt* * * * undermined *Priddy*'s holding" with respect to when the defendant must have the necessary intent.

The Fourth Circuit reached the same conclusion in *United States* v. *Bonilla*, 687 F.3d 188, 194 (2012), in affirming the defendant's sentence enhancement under § 2L1.2 of the Sentencing Guidelines based on his violation of the Texas burglary statute.[10] Explicitly parting ways with the Fifth Circuit in addressing the very same state statutory provision, the Fourth Circuit dismissed *Constante*'s reading of *Taylor* as "too rigid." *Ibid.* Since "proof of a completed or attempted felony *necessarily* requires proof that the defendant formulated the intent to commit a crime either prior to his unlawful entry or while unlawfully remaining in the building," the court determined that the statute "substantially correspond[ed]" to *Taylor*'s generic definition—even though it did not contain an express intent element. *Id.* at 193. In dissent, Chief Judge William Traxler explained that *Taylor*'s "with-intent-to-commit phrasing" retained the "requirement of contemporaneous intent * * * [that] was the essence of burglary at common law, as it was the element that distinguished the offense from trespass." *Id.* at 196-197.

The Ninth Circuit has likewise concluded that "*Taylor* allows for burglary convictions so long as the defendant formed the intent to commit a crime while

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United States v. *Ferguson*, 868 F.3d 514, 516 (2017) (reaffirming that Tenn. Code Ann. § 39-14-402(a)(3) constitutes generic burglary).

[10] The Fourth Circuit "rel[ies] on precedents evaluating whether an offense constitutes a 'crime of violence' under the Guidelines interchangeably with precedents evaluating whether an offense constitutes a 'violent felony' under the ACCA, because the two terms have been defined in a manner that is 'substantively identical.'" *United States* v. *King*, 673 F.3d 274, 279 n.3 (2012) (internal quotation marks omitted).

unlawfully remaining on the premises, regardless of the legality of the entry." *United States* v. *Reina-Rodriguez*, 468 F.3d 1147, 1155 (2006), overruled on other grounds by *United States* v. *Grisel*, 488 F.3d 844 (9th Cir. 2007). According to the court, requiring intent solely at entry "would render *Taylor*'s 'remaining in' language surplusage." *Ibid.* But the Ninth Circuit concluded, without explanation, that "remaining in" must refer to a continuing course of conduct rather than a discrete point in time. As such, the court ruled that the Utah second-degree burglary statute[11] was a crime of violence[12] under the Sentencing Guidelines.[13] *Id.* at 1157.

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[11] Utah Code Ann. § 76-6-202(1) (West 2015) ("An actor is guilty of burglary who enters or remains unlawfully in a building or any portion of a building with intent to commit [a crime].").

[12] Because a "violent felony as defined in the ACCA is nearly identical to a 'crime of violence' as defined in the Sentencing Guidelines," the Ninth Circuit has "used [its] analysis of the [latter] * * * to guide [its] interpretation of [the former]." *United States v. Prince*, 772 F.3d 1173, 1176 (9th Cir. 2014).

[13] *Reina-Rodriguez* significantly curtailed the reach of the Ninth Circuit's earlier ruling in *United States* v. *Bonat*, 106 F.3d 1472 (1997). *Bonat* held that the Arizona burglary statute failed to satisfy the definition of generic burglary because state courts had interpreted it "to allow a conviction even if the intent to commit the crime was formed after entering the structure." *Id.* at 1475. But as the court clarified in *Reina-Rodriguez*, Arizona state courts had construed its burglary statute so broadly as to eliminate the requirement of unlawful presence in a building. 468 F.3d at 1155 (noting that, "under Arizona law, a person may be convicted of burglary merely by committing the crime of shoplifting"). In Utah, however, unlawful presence was still a necessary element of burglary. *Id.* at 1156 (citing *State* v. *Rudolph*, 970 P.2d 1221, 1229 (Utah 1998)).

Lastly, the Tenth Circuit has held that intent to commit a crime may be formed at any point while the defendant is unlawfully present in the building. In *United States* v. *Dunn*, 96 F. App'x 600, 605 (2004), the court rejected the defendant's argument that the Texas burglary statute at issue in *Constante* and *Bonilla* did not support an ACCA sentencing enhancement because it "lack[ed] the coincidence of unprivileged entry and intent to commit a crime." See Appellant's C.A. Br. at 16, *United States* v. *Dunn*, 96 F. App'x 600 (2004) (No. 03-5011) (arguing that the statute "does not require intent to commit a crime at the time of entry"). Writing for the court, Judge Michael McConnell held that "this Court has squarely held that the elements of the Texas statute at issue 'substantially correspond to the generic elements of burglary contained in *Taylor*.'" *Id.* at 605 (citing *United States* v. *Spring*, 80 F.3d 1450, 1462 (10th Cir. 1996)). The court was thus "bound by circuit precedent" to conclude that criminal intent could be developed at any time while the defendant unlawfully remains on the premises. *Ibid.*

C. Review Is Necessary To Resolve This Entrenched Split

This split is unlikely to dissipate without the Court's intervention. It involves six of the regional courts of appeals—four, even if cases construing the virtually identical career offender Sentencing Guidelines provision are eliminated.[14] Compare *Constante*,

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[14] Cases construing the Guidelines provision should be considered as part of the split. Circuit courts routinely rely on ACCA and Sentencing Guidelines cases interchangeably when interpreting the *Taylor* definition of generic burglary. Even after the

544 F.3d at 587, and *McArthur*, 850 F.3d at 939, with *Priddy*, 808 F.3d at 684, and *Dunn*, 96 F. App'x at 605. But rather than taking steps to reconcile the disagreement, circuit courts have doubled down in recent rulings. See, *e.g.*, App., *infra*, 8a; *United States* v. *Ferguson*, 868 F.3d 514, 516 (6th Cir. 2017); *Bernel-Aveja*, 844 F.3d 206. That trend has persisted despite heated intra-circuit disagreement. See *Bernel-Aveja*, 844 F.3d at 215, 220 (opinions of Higginbotham & Owen, JJ.); *Bonilla*, 687 F.3d at 194 (Traxler, C.J., dissenting). Moreover, the circuit courts have repeatedly declined to grant rehearing en banc despite the urgings of judges and litigants, including the United States. See, *e.g.*, *Bernel-Aveja*, 844 F.3d at 245 (Owen, J., concurring) (what "unlawfully remaining in requires with regard to when intent must be formed" is an "important question[] that our court should decide en banc"); App, *infra*, 9a-10a; Order Denying Reh'g En Banc, *McArthur*, 850 F.3d 925 (8th Cir. No. 14-3335); Order Denying Reh'g En Banc, *Dunn*, 96 F. App'x 600 (10th Cir. No. 03-5011). Even those courts that have undertaken rehearing have not altered their position. See *McArthur*, 850 F.3d at 840 (on panel rehearing, reaffirming the initial panel decision in *United States* v. *McArthur*, 836 F.3d 931, 944 (8th Cir. 2016)).

Sentencing Commission removed the term "burglary of a dwelling" from the Guidelines' definition of "crime of violence" in 2016, see Amendments to the Sentencing Guidelines 1 (U.S. Sentencing Comm'n 2016), the courts of appeals have continued to cite former Guidelines cases in the ACCA context. See, *e.g.*, App., *infra*, 7a (discussing the Fourth Circuit's *Bonilla* ruling in the Guidelines context when addressing the intent requirement under *Taylor* and ACCA); *McArthur*, 836 F.3d at 939 (same).

In light of such intractable disagreement, "[o]nly the Supreme Court can resolve the split among the Circuit Courts as to when formation of intent for purposes of generic burglary must occur." 844 F.3d at 245 (Owen, J., concurring); accord Gov't Resp. to Reh'g Pet. at 10 (suggesting that because of the depth of disagreement, "[i]f a midstream correction is needed" to address the split, "it is needed elsewhere" than in the courts of appeals).

II. The Decision Below Is Wrong

To qualify as "burglary" under ACCA, a prior state conviction must have required proof of contemporaneous intent. That conclusion follows from this Court's precedent, ACCA's text and purpose, and better-reasoned circuit court decisions. The Sixth Circuit's contrary position conflicts with *Taylor*, undermines Congress' purpose of deterring violent crime, and leads to illogical results.

In *Taylor*, this Court rejected the notion that ACCA reaches any crime that happens to carry the title "burglary." Instead, the Court concluded that Congress had adopted "the generic, contemporary meaning of burglary," with three elements: "[1] an unlawful or unprivileged entry into, or remaining in, [2] a building or other structure, [3] with intent to commit a crime." 495 U.S. at 598 (citing 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13(a), (c), (e), at 466, 471, 474 (1986)). This definition is "practically identical" to ACCA's original statutory definition of "burglary," *ibid.*, which covered "any felony consisting of entering or remaining surreptitiously within a building * * * *with intent to engage* in conduct constituting a Federal or State of-

fense." See p. 3, *supra* (emphasis added); accord *Taylor*, 495 U.S. at 590 (finding "nothing in the history to show that Congress intended in 1986 to replace the 1984 'generic' definition of burglary with something entirely different").

"The most natural reading of *Taylor* and the sources on which it relied show that a generic burglary requires intent to commit a crime at the time of the unlawful or unprivileged entry or the initial 'remaining in' without consent." *McArthur*, 850 F.3d at 939 (citations omitted). First, by using the word "with," this Court "can only be understood as requiring the intent to accompany the other elements" of generic burglary. *Bonilla*, 687 F.3d at 197 (Traxler, C.J., dissenting) (citing *Webster's Encyclopedic Unabridged Dictionary of the English Language* 2183 (2001) (defining "with" as "accompanied by; accompanying")); see also *McArthur*, 850 F.3d at 939 (emphasizing the *Taylor* definition's use of "with"). If this Court had intended the elements to be independent of one another, it could have used "and" instead of "with."

Second, requiring contemporaneous intent aligns with the historical and other sources on which *Taylor* relied in determining the "generally accepted contemporary meaning" of burglary at the time of ACCA's enactment, including "the Model Penal Code." *Taylor*, 495 U.S. at 596-598 n.8. Those authorities support a contemporaneous intent requirement. See *McArthur*, 850 F.3d at 939. Looking to the same sources, Judge Colloton, writing for the Eighth Circuit, concluded that intent must either "exist at the time the defendant unlawfully remained within," *ibid.* (quoting 2 LaFave & Scott § 8.13(b), (e), at 468,

473-474 & n.101), or "accompany" the "entry" or "intrusion," *ibid.* (quoting Model Penal Code § 221.1 cmt. 3 (Am. Law Inst. 1980)). Accord *Herrera-Montes*, 490 F.3d at 392 (reaching the same conclusion after analyzing Black's Law Dictionary and the Model Penal Code). For instance, the Model Penal Code definition referenced in *Taylor* reads: "A person is guilty of burglary if he enters a building or occupied structure * * * *with* purpose to commit a crime therein." Model Penal Code § 221.1(1) (emphasis added). This understanding of intent is deeply rooted in the definition of burglary and distinguishes it from lesser property offenses, such as trespass. See 4 William Blackstone, *Commentaries on the Laws of England* 227 (1769) ("As to the *intent*; it is clear, that such breaking and entry must be with a felonious intent, otherwise it is only a trespass."); see also *Bonilla*, 687 F.3d at 196-197 (Traxler, C.J., dissenting) (quoting Blackstone); *Bernel-Aveja*, 844 F.3d at 218 (maintaining that "the most fundamental character of burglary" is that "the perpetrator trespass[es] while already harboring intent to commit a further crime.").

This position is also the most faithful to ACCA's purpose. "Congress singled out burglary * * * because of its inherent potential for harm to persons." *Taylor*, 495 U.S. at 588; see also H.R. Rep. No. 849, 99th Cong., 2d Sess. 3 (1986) ("The Subcommittee agreed to add the crimes * * * that involve conduct that presents a serious potential risk of physical injury to others * * * such as burglary."). This Court has recognized that contemporaneous intent is closely tied to the risk of violence because "[t]he fact that an offender enters a building *to commit a crime* often creates the possibility of a violent confrontation be-

tween the offender and an occupant." *Taylor*, 495 U.S. at 588 (emphasis added). Without such a requirement, ACCA's severe sentencing enhancements could be applied to any trespass with a subsequent crime, no matter the context or risk of harm.

There is a clear difference between breaking into a home *with the intent* to steal, or surreptitiously concealing oneself in a jewelry store until the close of business *with the intent* to take merchandise, on the one hand, and a hiker who enters an unoccupied cabin for protection from the cold and only later opportunistically decides to take food or supplies. The first two—each squarely within the generic meaning of burglary—can be said to pose a high risk of danger to persons; the latter does not. To the contrary, the entire rationale for defining burglary as a separate offense collapses if the crime sweeps so broadly. As the Model Penal Code aptly describes, "burglary is by hypothesis an attempt to commit some other crime" and was used at common law because of the difficulty of punishing inchoate offenses. Model Penal Code § 221.1 cmt. 1. Because modern criminal law has largely abandoned rigid limits on criminal attempt, burglary is only justifiable as an independent offense if it is limited to conduct that creates more danger than the underlying crime. The existence of criminal intent at the time of unlawful entry is a key factor that "creates the possibility of a violent confrontation." See *Taylor*, 495 U.S. at 588; cf. Model Penal Code § 221.1 cmt. 1 ("[E]ntry into a home at night in order to commit a theft is surely a more aggravated offense than an attempted theft alone, because of the additional element of personal danger that attends such conduct.").

"The ultimate absurdity," according to the authors of the Model Penal Code, would be "a provision * * * making it burglary to commit an offense 'in' a building, regardless of * * * *the intent with which he entered*." Model Penal Code § 221.1 cmt. 1 (emphasis added). To avoid this, the Code deliberately "exclude[s] from burglary [those] situations" that involve "no element of aggravation of the crime the actor proposes to carry forward." *Id.* cmt. 3(a) (discussing the need for an unlawful entry requirement); see also 2 LaFave & Scott § 8.13(a), at 467 (citing this definition as a "sound approach"). Michigan's statute allows for such an "ultimate absurdity" because it does not require that criminal intent accompany the unlawful occupation. By bringing this statute within generic burglary under ACCA, the Sixth Circuit would make a "career criminal" out of a Michigan hiker who seeks shelter and later commits a theft of opportunity, while outdoorsmen in a neighboring state may face no consequence beyond a petty misdemeanor. This approach clearly undermines both of Congress' objectives: deterring violent crime and guarding against unfair or disproportionate sentencing enhancements. See S. Rep. No. 190, 98th Cong., 1st Sess. 20 (1983) ("[ACCA] should ensure * * * that the same type of conduct is punishable on the Federal level in all cases.").

Circuits adopting the Sixth Circuit's view have relied on *Taylor*'s "remaining in" language, reasoning that "proof of a completed or attempted felony *necessarily* requires proof that the defendant formulated the intent to commit a crime either prior to his unlawful entry or while unlawfully remaining in the building." *Bonilla*, 687 F.3d at 193 (quoting Gov't

C.A. Br. at 7-8, *United States* v. *Bonilla*, 687 F.3d 188 (2012) (No. 11-4765)); see also App., *infra*, 8a. This argument, which sees "remaining in" as a continuous process, is inconsistent with *Taylor* and would lead to draconian results.

First, such a reading renders *Taylor's* "unlawful entry" language superfluous. The definition of generic burglary refers separately to "unlawful entry" and "remaining in." If it were true that the commission of a crime during an unlawful occupation "necessarily" proves that the requisite intent formed while "remaining in" the premises, then "every unlawful entry with intent would become 'remaining in' with intent as soon as the perpetrator enters" and the "unlawful entry" prong would be meaningless. *McArthur*, 850 F.3d at 939 (citations omitted). To give full weight to the Court's definition, both "unlawful entry" and "remaining in" must be read as discrete moments when an unlawful occupation begins. Therefore, a crime is only generic burglary if this specific act is done "with intent to commit a crime."

Second, the decision below pushes ACCA beyond its logical limits, triggering a fifteen-year mandatory sentencing enhancement not only for the hypothetical hiker, but also for a homeless person who sleeps in a warehouse and steals a coat on his way out or "teenagers who unlawfully enter a house only to party, and only later decide to commit a crime." *Herrera-Montes*, 490 F.3d at 392. The Sixth Circuit's approach would similarly punish a defendant who entered a neighbor's home for a glass of water after having been hired to mow her lawn, but who later decided to steal some food. *Cf. State* v. *Wesemann*, No. 03C01-9407-CR-00260, 1995 WL 605442, at *1-2

(Tenn. Crim. App. Oct. 16, 1995). These defendants may perhaps be fairly punished as thieves. These prior transgressions, however, would not be proof that they are the individuals targeted by ACCA: "career offenders * * * who commit * * * serious crimes as their means of livelihood." *Taylor*, 495 U.S. at 587.

This Court has consistently imposed a demanding standard for ACCA enhancements, requiring that prior crimes be "the same as, or narrower than, those of the generic offense" to avoid "unfairness to defendants." *Mathis* v. *United States*, 136 S. Ct. 2243, 2247, 2253 (2016). This exacting analysis ensures that only convictions that clearly constitute generic burglary trigger the mandatory enhancements. A failure to require contemporaneous intent misreads *Taylor* and broadens generic burglary beyond the strict confines provided by Congress.

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Once the Sixth Circuit's definitional error on contemporaneous intent is corrected, it is clear that the Michigan statute at issue here sweeps far beyond the definition of generic burglary. The statute applies to a defendant who "breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor." Mich. Comp. Laws § 750.110a(4)(a). This provision allows conviction for nothing more than "commit[ing] a misdemeanor" while "present in" "a dwelling" "without permission." *Ibid.* While the district court and Sixth Circuit did not have occasion to reach this question, petitioner has demonstrated (and would show on remand) that the government cannot carry its burden

of showing that he was convicted of generic burglary. See pp. 6-9, *supra*.

III. This Case Presents An Ideal Vehicle For Resolving An Issue Of Unquestionable Importance

As the Government has conceded, the question presented here is one of "exceptional importance," and "has broad and important implications" for federal sentencing. *Morris* Gov't Reh'g Pet. at I; *Morris* Gov't Stay Mot. at 4. And the Government has acknowledged "the Supreme Court's singular role in answering [that question]." *Morris* Gov't Stay Mot. at 7. The sheer number of ACCA cases litigated at every level of the federal court system shows the issue is a recurring one that warrants further review. This Court has interpreted ACCA ten times in just the past decade. See U.S. Sentencing Comm'n, *Selected Supreme Court Cases on Sentencing Issues* 3 (July 2015); see also, *e.g.*, *Mathis*, 136 S. Ct. 2245; *Johnson*, 135 S. Ct. 2553.

Moreover, as the Government recently emphasized, "burglary is * * * a frequently-used ACCA predicate." *Morris* Gov't Reh'g Pet. at 6. In fiscal year 2016 alone, the government prosecuted more than three hundred § 924(e) cases. U.S. Sentencing Comm'n, *Quick Facts: Mandatory Minimum Penalties* 2 (2017). The question whether a state-law burglary conviction qualifies as an ACCA predicate affects a significant number of these cases. As the House Report accompanying ACCA pointed out, "robbery and burglary are the crimes most frequently committed by * * * career criminals." *Taylor*, 495 U.S. at 581 (discussing H.R. Rep. No. 1073, 98th Cong., 2d Sess.

1, 3 (1984)). That statement is no less true today; as the government itself observed in seeking en banc review of the same question presented here, "the importance of burglary" as an ACCA predicate "is only magnified following the invalidation of the residual clause [in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015)]." *Morris* Gov't Reh'g Pet. at 6.

As Judge Owen has explained, at least 29 jurisdictions have burglary statutes that include unlawful "'remaining in.'" *Bernel-Aveja*, 844 F.3d at 229-230 (Owen, J. concurring). Out of those 29 state statutes, "at least fourteen States currently have 'remaining in' offenses that do not have as an element the timing requirement." *Id.* at 237. In other words, there are at least 14 states—and potentially as many as 21—where convictions under those state statutes may be ACCA predicates. *Id.* at 240.[15] That question "significantly impacts the federal sentencing regime, particularly given the centrality of burglary as one of four enumerated predicates has been amplified following *Johnson*'s invalidation of the residual clause." *Morris* Gov't Stay Mot. at 5.

The implications of the widespread disagreement on this frequently recurring issue are severe. As the Government itself has urged, "the Circuit split gravely undermines the uniform application of [ACCA]'s enhanced sentencing provisions," resulting in the uneven administration of justice. *Morris* Gov't Stay

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[15] In addition to the fourteen states discussed above, Judge Owen identified seven more states whose burglary statutes on their face potentially present the "contemporaneous intent" issue, but which state courts have not yet interpreted to decide whether intent is required. *Bernel-Aveja*, 844 F.3d at 240.

Mot. at 6. Indeed, the circuits are imposing drastically different sentences based on identical predicate burglary convictions. The Fifth and Sixth Circuits have diverged over whether a single Tennessee burglary statute supports ACCA enhancements. Compare *Priddy*, 808 F.3d at 684, with *Herrera-Montes*, 490 F.3d at 392. Likewise, the Fifth Circuit split from the Fourth and Tenth Circuits regarding enhancements for the very same Texas burglary statute. Compare *Constante*, 544 F.3d at 587, with *Bonilla*, 687 F.3d at 194, and *Dunn*, 96 F. App'x at 605. Thus, whether a defendant incurs a 15-year mandatory-minimum sentence enhancement under ACCA depends entirely on the jurisdiction in which he is federally prosecuted.

As the government has explained,

> The disagreement between the circuits on the timing of criminal intent question splinters application of burglary as an ACCA predicate nationwide. * * * [T]he split yields deeply disuniform treatment of the same burglary convictions in different jurisdictions. Given the significant enhanced sentencing penalties that attend the ACCA, the disparate treatment in varying jurisdictions of defendants who are convicted under the same state burglary statutes raises substantial concerns.

Morris Gov't Stay Mot. at 6-7. The Sentencing Commission has also recognized the difficulty courts have experienced in applying ACCA's statutory definitions of "crime of violence" or "violent felony," resulting in an increased "potential for inconsistent application of the mandatory minimum penalties." U.S. Sentencing Comm'n, *2011 Report to the Congress: Mandatory*

Minimum Penalties in the Federal Criminal Justice System 363 (Oct. 2011).

This result subverts ACCA's purposes of providing a "uniform definition" of burglary, and ensuring that the same type of conduct receives similar treatment at the federal level. *Taylor*, 495 U.S. at 592. The circuit split thus has produced the very arbitrariness that both Congress and this Court have long sought to avoid. Additionally, the significance of § 924(e)(1) for any individual defendant is also undoubtedly profound, imposing "a mandatory minimum sentence of imprisonment for 15 years." *Id.* at 581. In this case, reversal would almost certainly result in a sentence reduction of seven years. Where Circuits have found cotemporaneous intent to be necessary to satisfy generic burglary, the significance of the holding is evidenced by the resulting flood of defendants raising the issue.[16]

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[16] *E.g.*, *United States* v. *Emeary*, 794 F.3d 526, 529-530 (5th Cir. 2015) (holding that it was plain error to treat an offense under Tex. Penal Code Ann. § 30.02(a)(3) as a violent felony under ACCA); *United States* v. *St. Clair*, 608 F. App'x 192, 194 (5th Cir. 2015) (plain error to treat an offense under Tex. Penal Code Ann. § 30.02(a)(3) as a crime of violence under the Sentencing Guidelines); *United States* v. *Castaneda*, 740 F.3d 169, 175 (5th Cir. 2013) (same); *United States* v. *Trevino-Rodriguez*, 463 F. App'x 305, 307-308 (5th Cir. 2012) (same); *United States* v. *House*, 394 F. App'x 122, 124 (5th Cir. 2010) (granting defendant's 28 U.S.C. § 2255 motion for a sentence reduction in light of *Constante*); *United States* v. *Schleper*, No. CR 07-167 (01) (MJD), 2017 WL 2560916, at *2 (D. Minn. June 13, 2017) (granting post-conviction relief in light of *McArthur* because the burglary statute lacked the element of contemporaneous intent); *Stoner* v. *United States*, No. 1:16-CV-156 CAS, 2017 WL 2535671, at *5 (E.D. Mo. June 12, 2017) (same); *United States* v. *Willis*, No. CR 11-13 (DSD/JJK), 2017 WL 1288362, at *2 (D. Minn. Apr. 6,

This case presents a highly suitable vehicle for resolving the question presented. At each stage of the proceedings, petitioner preserved his claim that the prior conviction for home invasion did not qualify as "generic burglary" under ACCA because it lacked the contemporaneous intent element required by generic burglary. See App., *infra*, 1a, 7a. The panel conceded the existence of a circuit split on whether generic burglary requires intent at entry, App, *infra*, 7a, and treated that issue as dispositive of petitioner's claim on appeal, *ibid.* In opposing rehearing en banc, the Government conceded the split, identified no vehicle issues, and made no suggestion that petitioner had other prior convictions that would support the same enhancement—while nonetheless arguing that the panel correctly rejected a contemporaneous intent requirement under *Taylor*. See generally Gov't Resp. to Reh'g Pet.

2017) (same); *United States* v. *Latimore*, No. CR 12-83 ADM/JJG, 2017 WL 963142, at *1 (D. Minn. Mar. 9, 2017) (same); *United States* v. *Rodriguez*, No. CR 5-312 (MJD/AJB), 2017 WL 933024, at *2 (D. Minn. Mar. 8, 2017) (same); *United States* v. *Gardea-Hernandez*, No. 8:10CR405, 2011 WL 3563283, at *3-4 (D. Neb. Aug. 12, 2011) (accepting the Fifth Circuit's ruling in *Constante* to hold that a "conviction under Texas Penal Code § 30.02(a)(3) does not meet the generic, contemporary definition of burglary").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2017

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-1690

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMAR ALONZO QUARLES,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Michigan at Grand
Rapids.

Decided and Filed: March 10, 2017

Before: SILER, MOORE, and GRIFFIN, *Circuit Judges*.

SILER, *Circuit Judge*:

Defendant Jamar Quarles appeals his sentence, including the district court's determination that Michigan's crime of third-degree home invasion is equivalent to generic burglary, thus constituting a predicate offense under the Armed Career Criminal

Act ("ACCA"). Specifically, he argues that the Michigan statute: (1) includes locations that are broader than generic burglary and (2) does not properly have an intent-upon-entry element that is required under generic burglary. If Quarles succeeds on his challenge, he also challenges a three-point increase in criminal history. We affirm the district court's determination that Michigan's crime of third-degree home invasion is categorically equivalent to generic burglary.[1]

FACTUAL AND PROCEDURAL BACKGROUND

Quarles was charged in a single-count indictment with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). He pleaded guilty to that charge without a plea agreement. At his original sentencing, the district court held that Quarles's conviction for third- degree home invasion was a violent felony under the residual clause of the ACCA. The district court expressly declined to rule whether that offense qualified as generic burglary. Finding this as Quarles's third-predicate offense under the ACCA, the district court sentenced him to 204 months' incarceration. On appeal, this court vacated the sentence in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), and remanded the case for resentencing. On remand, the district court considered whether Michigan's crime of third-degree home invasion constituted a "violent felony." Finding that it was the "functional equivalent of generic burglary," the district court resentenced Quarles to 204 months' incarceration.

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[1] We do not address Quarles's arguments as they relate to the modified-categorical approach or his three-point increase in criminal history.

DISCUSSION

I. Quarles's *Johnson* Claim

a. Standard of Review

We review de novo whether a prior conviction qualifies as a "violent felony" under the ACCA. *United States v. Mitchell*, 743 F.3d 1054, 1058 (6th Cir. 2014).

b. Categorical Approach

When determining whether a particular crime qualifies as a violent felony, we start with the "categorical approach." *Id.* We look "to the fact of conviction and the statutory definition of the prior offense." *Id.* We then "compare the elements of the crime of conviction with the elements of the 'generic' version of the listed offense—*i.e.*, the offense as commonly understood." *Mathis v. United States*, 136 S. Ct. 2243, 2247 (2016). The prior conviction qualifies as an ACCA predicate offense only if its "elements are the same as, or narrower than, those of the generic offense." *Id.*

In this case, we must compare Michigan's third-degree home invasion statute with the elements of generic burglary. Michigan Compiled Laws § 750.110a(4) provides:

> (4) A person is guilty of home invasion in the third degree if the person does either of the following:
>
> (a) Breaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is

entering, present in, or exiting the dwelling, commits a misdemeanor.

(b) Breaks and enters a dwelling or enters a dwelling without permission and, at any time while the person is entering, present in, or exiting the dwelling, violates any of the following ordered to protect a named person or persons:

(i) A probation term or condition.

(ii) A parole term or condition.

(iii) A personal protection order term or condition.

(iv) A bond or bail condition or any condition of pretrial release.

The generic definition of burglary, as defined by the Supreme Court, is "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 598 (1990). Comparing these two definitions, Quarles argues that the Michigan statute is overbroad in two respects. First, he argues that the term "dwelling," as defined in the statute, encompasses more than the "building or other structure[s]" found in *Taylor*. Second, Quarles argues that the Michigan statute does not require intent to commit a crime upon entry, thus making it overbroad. We will address each of these arguments separately.

The Government argues that this court has already decided the issue. *See United States v. Gibbs*, 626 F.3d 344, 353 (6th Cir. 2010); *see also United States v. Horton*, 163 F. App'x 378, 381–82 (6th Cir. 2006) (finding that subsection (4)(a) of the third-degree home invasion statute is categorically the

equivalent of burglary of a dwelling). In *Gibbs*, this court held that "a conviction for second-degree home invasion under Michigan law is the equivalent of the enumerated offense of burglary of a dwelling and therefore constitutes a 'crime of violence.'" *Id.* at 353 (citations omitted). While second-degree home invasion and third-degree home invasion are indistinguishable for ACCA purposes, *Gibbs* was decided prior to *Descamps v. United States*, 133 S. Ct. 2276 (2013). Just to ensure that *Descamps* did not upset the holdings in *Gibbs* and *Horton*, we will engage in a full de novo review.

i. Dwelling

Michigan Compiled Laws § 750.110a(1)(a) defines a dwelling as "a structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter." Quarles argues that the term "shelter" could include places such as a "tree . . . a vehicle, boat, outcropping of rock, cave, bus stop, or a suspended tarp" that "are not buildings or structures." This argument fails.[2]

The Supreme Court has explained that "to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). In order to succeed, the defendant must show "a realistic probability, not a theoretical possibility, that the

---

[2] Quarles conceded, in the district court, that the term structure "arguably has the same meaning as the term 'structure' in the generic burglary definition." Therefore, his argument focuses on the term "shelter."

State would apply its statute to conduct that falls outside the generic definition of a crime." *Id.* In this case, Quarles offers only hypothetical arguments.

The main reason that Quarles can point only to hypothetical arguments rather than concrete examples is because the plain language of Michigan's third-degree home invasion statute is narrow. The American Heritage Dictionary defines shelter as "something, especially a structure, that provides cover or protection, as from the weather." While this definition does provide room for broad application, the Michigan statute limits shelter to only those that are "used permanently or temporarily as a place of abode." Mich. Comp. Laws § 750.110a(1)(a). The American Heritage Dictionary defines abode as "a dwelling place; a home." With this limitation, it would be a stretch, rather than a realistic probability, that a tree, vehicle, boat, outcropping of rock, cave, bus stop, or suspended tarp would be considered a "home." Furthermore, the claim that the Michigan legislature intended to encompass a broad range of places is undercut by the fact that when the legislature intended to include those places, they were expressly incorporated. For example, Michigan Compiled Laws § 750.110(1) states:

> A person who breaks and enters, with intent to commit a felony or a larceny therein, a tent, hotel, office, store, shop, warehouse, barn, granary, factory or other building, structure, boat, ship, shipping container, or railroad car is guilty of a felony punishable by imprisonment for not more than 10 years.

See, e.g., *United States v. Ritchey*, 840 F.3d 310, 318 (6th Cir. 2016) (finding Mich. Comp. Laws § 750.110 broader than generic burglary).[3]

Therefore, we hold this statute's use of the term "dwelling" does not encompass more areas than "building or structures" found in *Taylor*.

ii. Intent-At-Entry

An alternative way of committing third-degree home invasion is to break and enter a dwelling and, at any time while entering, present in, or exiting the dwelling, commit a misdemeanor. *See* Mich. Comp. Laws § 750.110a(4)(a). Quarles argues that this alternative "does not qualify as generic burglary" because it "does not necessarily have an intent-at-entry element."

The question of whether generic burglary requires intent at entry has resulted in a circuit split focusing on *Taylor*'s "remaining in" language. *Compare United States v. Bonilla*, 687 F.3d 188, 193–94 (4th Cir. 2012) (finding that *Taylor* does not require that intent exist at entry), *with United States v. Constante*, 544 F.3d 584, 587 (5th Cir. 2008) (finding a statute "is not a generic burglary under the *Taylor* definition because it does not contain an element of intent to commit a [crime] at the moment of entry"). Essentially, the circuit split hinges on whether the "remaining in" language allows for the development of intent at any point or whether the intent must exist at entry.

---

[3] In his Rule 28(j) letter, Quarles argues that *Ritchey* compels us to rule in his favor. However, *Ritchey* is distinguishable because the statute at issue explicitly lists places outside of buildings or structures.

We have already ruled on the issue. *See United States v. Priddy*, 808 F.3d 676, 685 (6th Cir. 2015). In *Priddy*, we determined whether a variant of the Tennessee burglary statute, Section 39-14-402(a)(3), qualified as an ACCA predicate offense. *Id.* Finding that it qualified under *Taylor*, we held that it was "a 'remaining-in' variant of generic burglary because someone who enters a building or structure and, while inside, commits or attempts to commit a felony will necessarily have remained inside the building or structure to do so." *Id.*

Accordingly, generic burglary, as defined in *Taylor*, does not require intent at entry; rather the intent can be developed while "remaining in." *See Taylor*, 495 U.S. at 598 (defining generic burglary as "an unlawful or unprivileged entry into, *or remaining in*, a building or other structure, with intent to commit a crime") (emphasis added).

AFFIRMED.

APPENDIX B

Case No. 16-1690

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMAR ALONZO QUARLES,

Defendant-Appellant.

Before: SILER, MOORE, and GRIFFIN, Circuit Judges

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk
/s/ Deborah S. Hunt

Issued: June 28, 2017

APPENDIX C
STATUTORY PROVISIONS

1. 18 U.S.C. § 922 provides:

* * *

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien--

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * *

2. 18 U.S.C. § 924 provides:

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever--

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of

a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or

(D) willfully violates any other provision of this chapter, shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly--

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922, shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a

violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if—

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)--

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or

otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

* * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C.

802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * *

3. Mich. Comp. Laws § 750.110a provides:

* * *

(4) A person is guilty of home invasion in the third degree if the person does either of the following:

(a) Breaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is

entering, present in, or exiting the dwelling, commits a misdemeanor.

(b) Breaks and enters a dwelling or enters a dwelling without permission and, at any time while the person is entering, present in, or exiting the dwelling, violates any of the following ordered to protect a named person or persons:

(i) A probation term or condition.

(ii) A parole term or condition.

(iii) A personal protection order term or condition.

(iv) A bond or bail condition or any condition of pretrial release.

* * *

No. 17-778

In the Supreme Court of the United States

JAMAR ALONZO QUARLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a state offense that criminalizes continued unlawful presence in a dwelling following the formation of intent to commit a crime has "the basic elements of unlawful * * * remaining in * * * a building or structure, with intent to commit a crime," *Taylor* v. *United States*, 495 U.S. 575, 599 (1990), thereby qualifying as "burglary" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii).

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In the Supreme Court of the United States

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JAMAR ALONZO QUARLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 850 F.3d 836. A prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 634 Fed. Appx. 578.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 2017. A petition for rehearing was denied on June 28, 2017 (Pet. App. 9a-10a). On September 15, 2017, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including November 24, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Michigan, petitioner

was convicted on one count of unlawful possession of a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Judgment 1. He was sentenced to 204 months of imprisonment, to be followed by five years of supervised release. *Id.* at 2-3. The court of appeals affirmed. Pet. App. 1a-8a.

1. On August 24, 2013, petitioner held his girlfriend, Chasity Warren, at gunpoint. Presentence Investigation Report (PSR) ¶¶ 7-8. Petitioner had just been released on parole following a prison sentence for shooting someone in Saginaw, Michigan, and he had assaulted Warren and threatened to kill her mother following his release. PSR ¶¶ 8-9. On the date in question, petitioner had taken Xanax pills and was unable to drive; he became angry and verbally abusive toward Warren when the car she was driving ran out of gas. PSR ¶ 10. Warren hailed a cab that took the pair to a gas station, where Warren locked herself in a bathroom. PSR ¶ 11. When Warren emerged, petitioner took her by the arm back to the car. *Ibid.* Petitioner, who had assumed control of the vehicle, grew angrier and struck Warren in the face. PSR ¶ 12. Warren asked to leave the car when petitioner stopped at a McDonald's restaurant, but petitioner physically prevented her from doing so. PSR ¶ 13.

Petitioner drove to his house where he "continued to yell at [Warren] and refused to let her leave." PSR ¶ 14. At one point, petitioner aimed a handgun at Warren's head, stating "You want to go to a wedding or a funeral?" *Ibid.* Petitioner then accused Warren of seeing other men. *Ibid.* Warren eventually fled the house and called 911. PSR ¶ 15.

Officers arrived at the scene and arrested petitioner, who had attempted to leave in a vehicle. PSR ¶ 15. During a protective sweep of petitioner's house, officers saw a .45-caliber semiautomatic pistol with six rounds of ammunition in the magazine. PSR ¶ 16. A subsequent forensic examination confirmed that DNA on the pistol's handgrip belonged to petitioner. PSR ¶ 18.

Upon further investigation, law enforcement learned that Layassa Moore, petitioner's ex-girlfriend, had filed a police report alleging that petitioner had recently visited her residence and demanded to see her children. PSR ¶¶ 19-21. When Moore had begun to argue with petitioner, he had pulled a gun from his waistband, pointed it at Moore, and told her not to argue with him as he proceeded upstairs into the residence. PSR ¶ 21.

2. A federal grand jury charged petitioner with one count of unlawful possession of a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). PSR ¶¶ 1-2. Petitioner pleaded guilty. PSR ¶ 4.

Under 18 U.S.C. 924(a)(2), the default term of imprisonment for the offense of unlawful possession of a firearm following a felony conviction is zero to 120 months. The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), increases that penalty to a term of 15 years to life if the defendant has "three previous convictions * * * for a violent felony or a serious drug offense," 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" to include, *inter alia*, any crime punishable by more than one year that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii).

The Probation Office determined that petitioner had three prior convictions under Michigan law that qualified as "violent felon[ies]" for purposes of the ACCA: (1) a 2002 conviction for third-degree home invasion; (2) a 2004 conviction for assault with a dangerous weapon; and (3) a 2008 conviction for felonious assault. PSR ¶¶ 40, 51, 54, 56. The Probation Office calculated petitioner's guidelines range at 188 to 235 months. PSR ¶¶ 40, 61, 103.

Petitioner objected to application of the ACCA, arguing that his prior conviction for third-degree home invasion did not constitute an ACCA predicate. D. Ct. Doc. 29, at 5-20 (Jan. 21, 2015). The district court overruled the objection. It held that the offense qualified under the ACCA's "residual clause" because the statute of conviction "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii); see 2/13/15 Sent. Tr. (Sent. Tr.) 16-22. The court then adopted the Probation Office's recommended guidelines range and sentenced petitioner to 204 months of imprisonment, above the 180-month mandatory minimum ACCA sentence, to be followed by five years of supervised release. *Id.* at 30-31, 39-43. Referencing the discretionary sentencing factors under 18 U.S.C. 3553(a), the court concluded that petitioner was "the paradigm picture for somebody * * * that should fall within the [ACCA], because in many ways on multiple occasions he's demonstrated that there's a very dangerous mix for [petitioner]: Firearms, a former girlfriend, and drugs and alcohol." Sent. Tr. 39.

3. Following petitioner's sentencing, this Court held in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), that the ACCA's residual clause is unconstitutionally vague. *Id.* at 2557. In light of *Johnson*, the court of appeals vacated petitioner's sentence and remanded the case to

the district court to determine whether petitioner's prior conviction for third-degree home invasion qualifies as an ACCA predicate because it constitutes the enumerated offense of "burglary." 634 Fed. Appx. at 579. Although the ACCA does not define "burglary," this Court in *Taylor* v. *United States*, 495 U.S. 575 (1990), construed the "generic" term to include "any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599.

4. On remand, the district court held that petitioner's prior conviction for third-degree home invasion was "the functional equivalent of generic burglary." 5/16/16 Resent. Tr. 23 (Resent. Tr.). As relevant here, the court rejected petitioner's argument that the Michigan offense —which punishes, among other things, instances in which an individual "breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor," Mich. Comp. Laws Ann. § 750.110a(4) (West Supp. 2001)—lacks the intent requirement of generic burglary. See Resent. Tr. 21-22. The court explained that the Michigan statute envisions a "specific-intent state crime," in that "the intent [must be formed] at the time of entry * * * or while still remaining in an unprivileged access in the house or in the structure." *Id.* at 22. The court remarked, "I don't see how you could have a specific-intent crime committed while residing or remaining in an unprivileged entry status and not satisfy what [*Taylor*] describes as generic burglary." *Ibid.*

The district court accordingly overruled petitioner's objection to his ACCA designation, adopted the same

188-to-235 month advisory guidelines range, and reimposed a 204-month term of imprisonment, to be followed by five years of supervised release. Resent. Tr. 23-24, 32. The court again cited petitioner's history of "visit[ing] violence on people * * * close to him with guns while on supervision," which, the court observed, was "exactly the kind of danger that * * * we're meant to address when the ACCA applies." *Id.* at 31-32; see *id.* at 30 (noting petitioner's "long list of trouble" and the "volatile mix of the drugs, the anger, the violence, and usually an ex-girlfriend, sometimes a present girlfriend").

5. The court of appeals affirmed. Pet. App. 1a-8a. The court rejected petitioner's argument that generic burglary includes "an intent-at-entry element," under which the defendant must form the requisite intent at the moment of unlawful entry. *Id.* at 7a-8a. The court cited *Taylor*'s definition of generic burglary, which includes the "unlawful or unprivileged entry into, *or remaining in*, a building or structure, with intent to commit a crime." *Id.* at 8a (quoting *Taylor*, 495 U.S. at 598). Although the court noted disagreement in the circuits about "whether generic burglary requires intent at entry," *id.* at 7a, it adhered to its prior decision holding that a similar Tennessee burglary statute satisfies the "remaining in" variant of generic burglary, see *id.* at 8a. The court explained that "someone who enters a building or structure and, while inside, commits or attempts to commit a felony will necessarily have," for purposes of *Taylor*, "remained inside the building or structure to do so." *Ibid.* (quoting *United States* v. *Priddy*, 808 F.3d 676, 685 (6th Cir. 2015), abrogated on other grounds by *United States* v. *Stitt*, 860 F.3d 854 (6th Cir. 2017), petition for cert. pending, No. 17-765 (filed Nov. 21, 2017)). The court accordingly reasoned that "generic burglary,

as defined in *Taylor*, does not require intent at entry; rather the intent can be developed while 'remaining in.'" *Ibid.* (quoting *Taylor*, 495 U.S. at 598).

The court of appeals denied petitioner's request for rehearing en banc. Pet. App. 9a-10a.

DISCUSSION

The court of appeals correctly rejected petitioner's argument that a defendant commits "generic" burglary, as defined in *Taylor* v. *United States*, 495 U.S. 575 (1990), only if he has already formed the intent to commit a crime when he unlawfully enters or initially remains in a building or structure. The question presented, however, has divided the courts of appeals. The Court's review is warranted to resolve this frequently recurring question regarding the scope of an important ACCA predicate.[1] In the alternative, this Court may wish to hold the petition in this case pending its disposition of the government's petition for a writ of certiorari in *United States* v. *Stitt*, No. 17-765 (filed Nov. 21, 2017), which may illuminate the proper scope of "burglary" under the ACCA.

1. The court of appeals correctly determined that a conviction under the Michigan third-degree home-invasion statute constitutes a conviction for "generic" burglary under a straightforward application of *Taylor*.

In *Taylor*, this Court held that Congress intended "burglary" in the ACCA to have a "uniform definition." 495 U.S. at 580; see *id.* at 591-592. The Court declined to adopt the common law's definition of burglary—"'the

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[1] Two other pending petitions for writs of certiorari present the same question. See *Ferguson* v. *United States*, No. 17-7496 (filed Jan. 17, 2018); *Secord* v. *United States*, No. 17-7224 (filed Dec. 19, 2017).

breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony'"—because that narrow definition "ha[d] little relevance to modern law enforcement concerns" that animated the ACCA. *Id.* at 580 n.3, 593 (citation omitted). The Court instead adopted a broader construction of "burglary" that encompasses any "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599. *Taylor* further held that the ACCA generally requires a "categorical approach" to determining whether or not an offense constitutes a "violent felony." *Id.* at 600. Under that approach, sentencing courts must "look[] only to the statutory definitions of the prior offenses, and not to the particular facts underlying th[e] convictions." *Ibid.*

The court of appeals correctly determined that petitioner's conviction for third-degree home invasion under Michigan law satisfies *Taylor*'s definition of "burglary." Section 750.110a(4)(a) provides that

> A person is guilty of home invasion in the third degree if the person * * * [i] [b]reaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, [ii] enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or [iii] breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor.

Mich. Comp. Laws Ann. § 750.110a(4)(a) (West Supp. 2001). As interpreted by the lower courts, to commit that offense, petitioner necessarily had to form the requisite intent to commit a misdemeanor either before he entered the dwelling or while he was still inside. Even

if the intent was formed after petitioner entered, his offense satisfied *Taylor*'s definition of "burglary" because petitioner, like anyone violating Section 750.110a(4)(a), entered the dwelling unlawfully and "remain[ed]" there "with intent to commit a crime." *Taylor*, 495 U.S. at 599.

Petitioner objects (Pet. 20-27) to that application of *Taylor* because the Michigan home-invasion statute does not require that the defendant have the intent to commit a crime at the time of his *initial* decision to remain in the dwelling. Put differently, petitioner treats (Pet. 14) "remaining in" under *Taylor* as a precise moment in time when the length or circumstances of a defendant's presence first render it unpermitted, and petitioner would require the formation of criminal intent at that time. See Pet. 24-25. But "[n]either the dictionary definition nor the common usage," *Honeycutt* v. *United States*, 137 S. Ct. 1626, 1632 (2017), of the word "remain" supports that reading, see, *e.g.*, *Webster's Third New International Dictionary* 1919 (1993) (defining "remain" as to be "still extant, present, or available"). The Michigan statute criminalizes "burglary" under *Taylor* because it applies when a defendant develops the intent to commit a crime while he continues to be present in a dwelling without authorization.

Petitioner further argues (Pet. 25) that giving "remaining in" its common meaning "renders *Taylor*'s 'unlawful entry' language superfluous." But regardless of how the mens rea requirement is interpreted, the reference to unlawful entry is necessary to make clear that a defendant can commit burglary when either his entry or his continued presence after entry is unlawful. Nor is petitioner correct (Pet. 21-22) that treating "remaining in" as a discrete event is "most faithful to ACCA's purpose." Contrary to petitioner's view (Pet. 22-23), no

greater "inherent potential for harm to persons" exists when a defendant enters or initially remains in a building or structure with the intent to commit a crime, as compared to developing that intent later. *Taylor*, 495 U.S. at 588. *Taylor* recognized that a surprise encounter between an occupant and an intruder increases the "possibility of a violent confrontation" on either side. *Ibid.* Neither the homeowner nor the burglar is less likely to respond with violence simply because the burglar developed the intent to commit a crime only after his initial trespass.

2. Although the court below correctly resolved the question presented, its decision implicates a circuit conflict that warrants resolution by this Court.

The Fourth and Ninth Circuits, like the court of appeals here, hold that a statute corresponds to *Taylor*'s generic definition of burglary if it requires that a defendant "develop[] the intent to commit the crime while remaining in the building, even if he did not have it at the moment he entered." *United States* v. *Bonilla*, 687 F.3d 188, 194 (4th Cir. 2012) (determining that a conviction for burglary under Texas Penal Code Annotated § 30.02(a)(3) (West 2011) constitutes a conviction for burglary under the ACCA), cert. denied, 134 S. Ct. 52 (2013); see *United States* v. *Reina-Rodriguez*, 468 F.3d 1147, 1155 (9th Cir. 2006) ("*Taylor* allows for burglary convictions so long as the defendant formed the intent to commit a crime while unlawfully remaining on the premises, regardless of the legality of the entry."), overruled on other grounds, *United States* v. *Grisel*, 488 F.3d 844 (9th Cir.) (en banc), cert. denied, 552 U.S. 970 (2007).[2]

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[2] Petitioner states (Pet. 18) that in *United States* v. *Dunn*, 96 Fed. Appx. 600, cert. denied, 543 U.S. 949 (2004), the Tenth Circuit held that the intent to commit a crime may be formed at any point while

By contrast, the Fifth and Eighth Circuits have held that ACCA burglary requires that the defendant intend to commit a crime at the time of his initial entry or decision to remain in a building or structure without authorization. The Fifth Circuit recently decided the issue in en banc proceedings, considering the same Texas burglary statute at issue in the Fourth Circuit's decision in *Bonilla*, *supra*. *United States* v. *Herrold*, 883 F.3d 517, 531-536 (5th Cir. 2018); see *United States* v. *Bernel-Aveja*, 844 F.3d 206, 214 (5th Cir. 2016); *United States* v. *Constante*, 544 F.3d 584, 587 (5th Cir. 2008) (per curiam); *United States* v. *Herrera-Montes*, 490 F.3d 390, 392 (5th Cir. 2007). The Eighth Circuit similarly determined in *United States* v. *McArthur*, 850 F.3d 925 (2017), that "a generic burglary requires intent to commit a crime at the time of the unlawful or unprivileged entry or the initial 'remaining in' without consent." *Id.* at 939. Given that the Fifth Circuit has addressed the issue en banc, and the Eighth Circuit denied the government's request for rehearing en banc in *McArthur*, see 2/24/17 Order (No. 14-3335), the conflict is unlikely to be resolved without this Court's intervention.[3]

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the defendant is unlawfully present in a building or structure. The court of appeals' unpublished decision in *Dunn* does not squarely address the question presented. Its conclusion that Texas Penal Code § 30.02(a)(3) (West 1992) constitutes generic burglary under *Taylor* relies entirely on the court's prior opinion in *United States* v. *Spring*, 80 F.3d 1450 (10th Cir. 1996), which considered a challenge to the statute's locational element and did not address when a defendant must form the intent to commit a crime, *id.* at 1462. See *Dunn*, 96 Fed. Appx. at 605.

[3] The Seventh Circuit will soon address whether Minnesota burglary qualifies as generic ACCA burglary—the same question resolved by the Eighth Circuit in *McArthur*. See *Van Cannon* v. *United States*, No. 17-2631 (7th Cir. Argued Jan. 18, 2018).

The question presented is important because burglary is a frequently recurring ACCA predicate. And this case presents a suitable vehicle for resolving the question, which the court of appeals addressed in a published opinion. See Pet. App. 1a-8a. Although two other pending petitions for writs of certiorari raise the same question, see *Ferguson* v. *United States*, No. 17-7496 (filed Jan. 17, 2018); *Secord* v. *United States*, No. 17-7224 (filed Dec. 19, 2017), each presents a less suitable vehicle. The district court in *Ferguson* determined that the petitioner was convicted of a specific variant of Tennessee burglary that would qualify as generic burglary under any circuit's interpretation of *Taylor*, *supra*; the petitioner in *Ferguson* is thus unlikely to benefit from a decision in his favor on the question presented. And *Secord* arises from the court of appeals' unpublished denial of a certificate of appealability. This Court should therefore grant the petition for a writ of certiorari in this case and hold the petitions in *Ferguson* and *Secord* pending its disposition of this case.

3. In the alternative, this Court may wish to hold the petition in this case pending its disposition of the government's petition for a writ of certiorari in *United States* v. *Stitt*, No. 17-765 (filed Nov. 21, 2017). *Stitt* presents the question whether burglary of a nonpermanent or mobile structure adapted or used for overnight accommodation can qualify as "burglary" under the ACCA. If the Court grants certiorari in *Stitt* and resolves that question, its decision may provide guidance on the proper scope of ACCA burglary and the question presented here.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending the Court's disposition of the petition for a writ of certiorari in *United States* v. *Stitt*, No. 17-765 (filed Nov. 21, 2017), and then be disposed of as appropriate.

Respectfully submitted.

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MARCH 2018

No. 17-778

In the Supreme Court of the United States

JAMAR ALONZO QUARLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The government concedes, as it must, that the question presented here—whether generic burglary under *Taylor* v. *United States*, 495 U.S. 575 (1990), requires proof that intent to commit a crime was present at the time of unlawful entry or first unlawful remaining—"has divided the courts of appeals" and is a "frequently recurring question regarding the scope of an important ACCA predicate." U.S. Br. 7. And the Government agrees with petitioner that "[t]he Court's review is warranted." *Ibid.* This Court has consistently granted certiorari where the United States, as respondent, agreed that review was warranted—including in a recent case involving ACCA. See *Mathis* v. *United States*, No. 15-6092, 136 S. Ct. 894 (2016); see also, *e.g.*, *Lucia* v. *Securities & Exchange Comm'n*, 17-130, 138 S. Ct. 736 (2018); *Kokesh* v. *Securities & Exchange Comm'n*, No. 16-529, 137 S. Ct. 810 (2017); *Bruce* v. *Samuels*, No. 14-844, 135 S. Ct. 2833 (2015); *Menominee Indian Tribe of Wisconsin* v. *United States*, No. 14-510, 135 S. Ct. 2927 (2015); *Mach Mining, LLC* v. *EEOC*, No. 13-1019, 134 S. Ct. 2872 (2014). It should do so here.

1. The time is ripe for this Court's review. Burglary is one of the "most frequently committed" ACCA predicate offenses, *Taylor*, 495 U.S. at 581 (discussing H.R. Rep. No. 1073, 98th Cong., 2d Sess. 1, 3 (1984)). As the government noted in seeking rehearing en banc on this very issue, the question presented "significantly impacts the federal sentencing regime, particularly given the centrality of burglary as one of four enumerated predicates has been amplified following *Johnson* [v. *United States*]'s

invalidation of the residual clause." *Morris* Gov't Stay Mot. at 5 (citing *Johnson*, 135 S. Ct. 2551 (2015)).[1]

Further delay would serve no purpose. Courts accounting for *fully 75%* of all federal criminal prosecutions have weighed in,[2] and the depth of the split means that "the conflict is unlikely to be resolved without this Court's intervention." U.S. Br. 11. The issue arises so frequently that just during the pendency of this petition in this Court, the en banc Fifth Circuit decided the issue, see *United States* v. *Herrold*, 883 F.3d 517, 531-536 (5th Cir. 2018), and two other petitions were filed presenting the same issue (albeit each with vehicle complications not present here). U.S. Br. 7 n.1; *id.* at 12.

The government half-heartedly suggests that "[i]n the alternative" to granting review, this Court "may wish to hold the petition in this case pending its disposition of * * * *United States* v. *Stitt*, No. 17-765 (filed Nov. 21, 2017 [and distributed for Conference of April 13, 2018])." U.S. Br. 7. A merits decision in *Stitt*, the government suggests, "may illuminate the proper scope of 'burglary' under the ACCA." *Ibid.*; see also *id.* at 12. But *Stitt* involves a completely different aspect of the definition of burglary: i.e., locations covered under generic burglary, and "[w]hether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as 'burglary' under [ACCA]." Pet. I, *United States* v. *Stitt*,

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[1] All defined terms are given the same meaning as in the petition.

[2] See Admin. Office of U.S. Courts, *Statistical Tables for the Federal Judiciary 2017*, Table D-3, https://goo.gl/vsrQx5.

No. 17-765. *Stitt* presents no question regarding *mens rea* or when a defendant must have developed the intent to commit a crime, for ACCA generic burglary. Nor are such issues fairly included within the question framed in *Stitt*. See R. 14.1(a); *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992). The government's reply brief in *Stitt* essentially concedes this point, distinguishing the "sole[] * * * ground" for decision in *Stitt*—i.e., whether generic burglary "applies to nonpermanent and mobile dwellings"—from questions involving *Taylor*'s intent requirement for ACCA burglary. U.S. Reply Br. at 10-11, *United States* v. *Stitt*, No. 17-765.

The government does not explain how this Court's resolution of the mobile-structure question in *Stitt* would meaningfully inform the contemporaneous-intent question presented here. For good reason. The Sixth Circuit already concluded that whether generic burglary applies to non-permanent structures, see *United States* v. *Stitt*, 860 F.3d 854, 860-861 (6th Cir. 2017) (en banc), does not affect that court's analysis of the contemporaneous-intent question here, see *United States* v. *Priddy*, 808 F.3d 676, 684-685 (6th Cir. 2015). The Sixth Circuit explained that "[n]othing in *Stitt* * * * undermined *Priddy*'s holding on [the intent requirement for generic] burglary," and as a result, "*Priddy*'s burglary analysis remains controlling." *United States* v. *Ferguson*, 868 F.3d 514, 516 (6th Cir. 2017). The Fifth Circuit also views the two questions as independent, recently reaffirming ACCA's contemporaneous-intent requirement, while expressly declining to reach the *Stitt* question. See *Herrold*, 883 F.3d at 536-541.

2. As the government correctly concluded, U.S. Br. 12, the two other petitions presenting this question are "less suitable vehicle[s]" than this case. In *Ferguson* v. *United States*, No. 17-7496, the district court stated that the "documents for each of [Ferguson's] three burglary convictions indicated his guilty pleas were to [a statutory provision]" which explicitly requires that the defendant entered the location "with intent to commit" a crime. Pet. at 8-9, *Ferguson*, *supra*. Ferguson challenged that determination on appeal, but the Sixth Circuit did not reach the issue, because it concluded that any of the statute's subsections constituted "generic burglary" under *Priddy*. In addition, "the district court originally concluded that Mr. Ferguson's five aggravated burglary convictions all qualified as violent felonies," before the Sixth Circuit reversed that conclusion based on *Stitt*. Pet. at 7, *Ferguson*, *supra*. If this Court were to reverse in *Stitt*, Ferguson may remain eligible for the ACCA enhancement on that basis. *Secord* v. *United States*, No. 17-7224, arises from an unpublished denial of a certificate of appealability to review the district court's denial of a 28 U.S.C. § 2255 petition. Because a certificate of appealability may issue only upon "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), that posture and other potential vehicle problems add a layer of complexity to the analysis. *E.g.*, Pet. at 4, *Secord*, *supra*.

3. The government only briefly (and unpersuasively) defends the judgment below. It does not even acknowledge—never mind engage—*Taylor*'s analytical approach for defining generic burglary. A contemporaneous-intent requirement "has the support

of the sources that the *Taylor* Court relied on in crafting its generic burglary definition," including contemporaneous treatises and state laws. *Herrold*, 883 F.3d at 532-533 & nn.92-96 (discussing 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law*, § 8.13(b), 468 (1986)). While *Taylor*'s definition would have been recognized as burglary by most states at the time, 495 U.S. at 598, "not all states used 'remaining in' language in their burglary statutes," and those that did were "split in how they understood its scope." *Herrold*, 883 F.3d at 533-534 & nn. 100-102; see also *id.* at 534 & n.107 (noting "lack of consensus [in state practice] that existed at the time *Taylor* was decided"). Textually, the government's reading "puts entry almost entirely out of focus; because all entry is followed by [the government's] version of remaining in, * * * almost every instance of entry would automatically involve remaining in." *Id.* at 532. Finally, "[s]cenarios in which a defendant trespasses but does not intend to commit a crime"—such as a "'teenager[] who unlawfully enter[s] a house only to party, and only later decide[s] to commit a crime'"—"must engender less risk of confrontation than ones in which he enters *just to commit a crime*," *Herrold*, 883 F.3d at 534 (emphasis in original; quoting *United States* v. *Herrera-Montes*, 490 F.3d 390, 392 (5th Cir. 2007)).

CONCLUSION

The petition should be granted.

Respectfully submitted.

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IN THE

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Petitioner,

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UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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U.S. Sentencing Comm'n, *Quick Facts: Mandatory Minimum Penalties* (2016), https://tinyurl.com/ybpwlwnn.....11

INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

INTRODUCTION AND SUMMARY OF ARGUMENT

Imagine that a homeless person breaks into a building to seek shelter from a winter storm. While inside the building, he finds a jacket and puts it on to keep warm. The next day, when he goes to leave, he decides to keep the jacket. *See People v. Gaines*, 546

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[1] Counsel of record for the parties have received timely notice of the intent to file this brief and have consented to this filing. No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae and its counsel has made any monetary contribution to the preparation or submission of this brief.

N.E.2d 913, 914 (N.Y. 1989). Has that person committed the offense of generic burglary?

It depends who you ask. The Fifth and Eighth Circuits would say no. They would observe that the homeless person did not intend to steal the jacket when he entered the building; he simply sought shelter from the storm. Under this approach, if there is no intent to commit a crime at the *outset* of the trespass, there is no generic burglary. The Fourth, Sixth, Ninth, and Tenth Circuits, on the other hand, would say yes. They would assert that it does not matter whether the individual intended to steal the jacket when he broke into the building as long as he developed that intent at some point *while* trespassing. Under this approach, every crime committed while trespassing is transformed into burglary, no matter the intent at the outset.

What is the cause of this dispute? Generic burglary, everyone agrees, is "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 598 (1990). The difficult question is *when* the intent to commit a crime must manifest itself. This turns on the interpretation of *Taylor*'s pronouncement that "unprivileged entry into, or remaining in ... a building ... with intent to commit a crime" constitutes burglary. *Id.* Does "remaining in," like entry, reflect a discrete moment in time—the first moment that one's presence becomes unauthorized after an initially lawful entry? If yes, this interpretation leads to the Fifth and Eighth Circuits' conclusion. Or, instead, does "remaining in" embody a continuous period of time that incorporates the

entire duration of a trespass? The latter view leads to the Fourth, Sixth, Ninth, and Tenth Circuits' position.

The importance of resolving the circuit split on this issue is underscored by the existence of numerous state burglary statutes that characterize any crime committed while trespassing as burglary. Any of these state statutes could become an ACCA predicate in the Circuits that have misinterpreted the "remaining in" language in *Taylor*, and consequently the elements of generic burglary.

Clarity is urgently needed on this point because the issue is so consequential: Hundreds of defendants face harsh mandatory minimums under the Armed Career Criminal Act (ACCA) every year, and many of those mandatory minimums are predicated on state burglary offenses. Under the categorical approach that this Court has mandated, courts must compare the elements of a particular state burglary offense to those of generic burglary. Properly articulating the elements of generic burglary is thus crucial to the inquiry. The approach taken by the Fourth, Sixth, Ninth, and Tenth Circuits is wrong and threatens to dramatically expand the kind of conduct triggering ACCA's mandatory minimums.

This case is an ideal vehicle to resolve the dispute. The Michigan home invasion statute that served as a predicate for Petitioner's ACCA enhancement requires only that one enter a dwelling without authorization and subsequently commit a crime. *See* Mich. Comp. Laws § 750.110a(4)(a). The interpretation of

the intent element of generic burglary—whether intent to commit a crime must be present at the outset of a trespass—is thus dispositive. The issue was preserved and the Sixth Circuit squarely addressed it. Pet. App. 7a-8a. This Court should grant the petition.

ARGUMENT

I. This Case Presents A Threshold Question Under The Categorical Approach: What Are The Elements Of Generic Burglary?

The question presented in this case asks which set of circuits has correctly defined the elements of generic burglary. Resolution of this dispute is critical because the definition of generic burglary underlies the entire categorical approach analysis in any case where burglary is a predicate offense under ACCA's enhanced sentencing regime.

As this Court explained in *Mathis v. United States*, the categorical approach compares the elements of the state predicate offense at issue to the elements of the generic offense. 136 S. Ct. 2243, 2248 (2016) ("The court ... lines up that crime's elements alongside those of the generic offense and sees if they match."); *id.* at 2249 ("The court can then compare that crime, as the categorical approach commands, with the relevant generic offense."). It is thus impossible to conduct this analysis without first properly defining the elements of the generic offense.

A. Petitioner's Case Involves An Entrenched Circuit Split On Whether Criminal Intent Must Exist When A Trespass *Begins*.

Petitioner's mandatory minimum sentence under ACCA was predicated, in critical part, on his conviction for home invasion in the third degree under Michigan law. Pet. App. 1a. The "least of the acts criminalized" under that statute, *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010) (brackets and internal quotation marks omitted)), is "break[ing] and enter[ing] a dwelling or enter[ing] a dwelling without permission and, at any time while ... entering, present in, or exiting the dwelling, commit[ting] a misdemeanor." Mich. Comp. Laws § 750.110a(4)(a). Petitioner argued below that violating this statute could not serve as an ACCA predicate because it "allow[ed] for the development of intent at any point," Pet. App. 7a—in other words, the statute did not require that unlawful entry be accompanied by criminal intent *at the time the trespass began*.

In considering this argument, the Sixth Circuit invoked this Court's observation in *Taylor* that burglary can consist of "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." Pet. App. 8a (quoting *Taylor*, 495 U.S. at 598). Noting that "someone who enters a building or structure and, while inside, commits or attempts to commit a felony will necessarily have remained inside the building or structure to do so," Pet. App. 8a (quoting *United States v. Priddy*, 808 F.3d 676, 685 (6th Cir. 2015),

abrogated on other grounds by United States v. Stitt, 860 F.3d 854 (6th Cir. 2017)), the Sixth Circuit held that "generic burglary, as defined in *Taylor*, does not require intent at entry; rather the intent under generic burglary can be developed while 'remaining in.'" Pet. App. 8a. As a result, the Sixth Circuit held that Michigan home invasion in the third degree was a generic burglary offense. *Id.*

Other circuits have used the same reasoning to reach the same conclusion about similar statutes. In *United States v. Bonilla*, 687 F.3d 188 (4th Cir. 2012), the Fourth Circuit held that someone who commits a crime after an unauthorized entry "necessarily developed the intent to commit the crime while remaining in the building, if he did not have it at the moment he entered." *Id.* at 194; *see also id.* at 193 ("[B]ecause the Texas statute applies only where a defendant's entry or remaining in a building is unlawful, proof of a completed or attempted felony necessarily requires proof that the defendant formulated the intent to commit a crime either prior to his unlawful entry or while unlawfully remaining in the building."). In *United States v. Reina-Rodriguez*, the Ninth Circuit likewise held that *Taylor*, like the Utah statute at issue in that case, "allows for burglary convictions so long as the defendant formed the intent to commit a crime while unlawfully remaining on the premises." 468 F.3d 1147, 1155 (9th Cir. 2006), *overruled on other grounds by United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007). Finally, the Tenth Circuit, albeit with little analysis, has held as well that a state statute requiring only unauthorized entry and subsequent commission of an offense nevertheless qualified as generic burglary. *See United States v. Spring*, 80 F.3d 1450,

1462 (10th Cir. 1996). In these circuits, then, generic burglary consists of any crime committed while trespassing.

These holdings are in clear conflict with the Fifth and Eighth Circuits' decisions. Although the Fifth and Eighth Circuits acknowledge *Taylor*'s "remaining in" language, these courts disagree that this language "necessarily," Pet. App. 8a (quoting *Priddy*, 808 F.3d at 685), transforms every crime committed while trespassing into burglary. Instead, as the Eighth Circuit explained, "[t]he most natural reading of *Taylor* and the sources on which it relied show that a generic burglary requires intent to commit a crime at the time of the unlawful or unprivileged entry or the *initial* 'remaining in' without consent." *United States v. McArthur*, 850 F.3d 925, 939 (8th Cir. 2017) (emphasis added). Under this interpretation, "[t]he act of 'remaining in' a building, for purposes of generic burglary, is not a continuous undertaking. Rather, it is a discrete event that occurs at the moment when a perpetrator, who at one point was lawfully present, exceeds his license and overstays his welcome." *Id.* (citing 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § § 8.13(b), (e), at 467-68 & n.47, at 473-75 (1986)); *see also United States v. Herrera-Montes*, 490 F.3d 390, 392 (5th Cir. 2007) ("*Taylor* requires that the defendant intend to commit a crime at the time of unlawful entry or remaining in."). In these circuits, generic burglary does not broadly encompass any crime committed while trespassing. Instead, "when a conviction is for burglary committed by unlawful entry, the intent to commit a crime on the premises must be formed by the time of entry." *United States v. Bernel-Aveja*, 844 F.3d 206, 212 (5th Cir.

2016). Similarly, if the conviction involves lawful entry but subsequent unlawful remaining, intent to commit a crime must exist by the time of the initial unlawful remaining. *McArthur*, 850 F.3d at 939.

This circuit split extends to *identical* state statutes. The Fifth Circuit has determined that Tennessee's burglary statute, Tenn. Code § 39-14-402(a), does *not* qualify as generic burglary and thus does not trigger ACCA mandatory minimums. *Herrera-Montes*, 490 F.3d at 391. The Sixth Circuit has reached the opposite conclusion with respect to the exact same statute. *Priddy*, 808 F.3d at 685. Similarly, the Fifth Circuit has determined that Texas's burglary statute, Tex. Penal Code § 30.02(a), does not qualify as generic burglary and thus does not trigger ACCA penalties. *United States v. Constante*, 544 F.3d 584, 587 (5th Cir. 2008). The Fourth Circuit has reached the opposite conclusion with respect to that very provision. *Bonilla*, 687 F.3d at 194.

The conflict is clear. On the one hand, the Fifth and Eighth Circuits interpret generic burglary under *Taylor* as requiring criminal intent at the outset of the trespass, when the would-be burglar first enters or first unlawfully remains on the premises. On the other hand, the Fourth, Sixth, Ninth, and Tenth Circuits interpret generic burglary under *Taylor* as permitting criminal intent to develop at any point during the trespass even if it is absent at the time of unlawful entry or first unlawful remaining. Which conception governs is dispositive here, as the Michigan statute requires only that a defendant enter without authorization and subsequently commit a crime; there is no

intent-at-entry (or intent-at-first-remaining) requirement.

B. The Circuit Split Implicates Numerous State Burglary Statutes.

A wide range of state statutes potentially trigger ACCA's mandatory minimum sentences, highlighting the urgent need for this Court to resolve the disagreement among the circuits on the meaning of *Taylor*'s "remaining in" language.

Even apart from the particular provisions referenced above, various state burglary statutes across the country contain provisions under which "a defendant may form the purpose to commit a criminal offense at any point during the course of a trespass." *State v. Fontes*, 721 N.E.2d 1037, 1040 (Ohio 2000) (construing Ohio Rev. Code § 2911.11). Under these statutes, "[t]he intent necessary for commission of burglary ... 'need not be formed at the precise moment of entry, but can be formed thereafter.'" *Williams v. State*, 601 S.E.2d 833, 836 (Ga. Ct. App. 2004) (construing Ga. Code Ann. § 16-7-1); *see also, e.g., Gratton v. State*, 456 So. 2d 865, 872 (Ala. Crim. App. 1984) ("[T]he intent to commit a crime [under Ala. Code § 13A-7-5, -6, and -7] may be concurrent with the unlawful entry or it may be formed after the entry...."); *Braddy v. State*, 111 So. 3d 810, 844 (Fla. 2012) (holding that defendant may be convicted of burglary under Fla. Stat. Ann. § 810.02(1) if intent to commit some further crime developed "at some point" during trespass); *State v. Rudolph*, 970 P.2d 1221, 1229 (Utah 1998) ("[W]e hold that a person is guilty of burglary under [Utah Code Ann. §] 76-6-202(1) if he

forms the intent to commit a felony, theft, or assault at the time he unlawfully enters a building or at any time thereafter....."); *State v. Allen*, 110 P.3d 849, 853 (Wash. Ct. App. 2005) (holding that a defendant may be convicted of burglary under Wash. Rev. Code Ann. § 9A.52.030(1) "[r]egardless of whether [he] possessed an intent to commit a crime at the time of the unlawful entry").

The number of states with broad burglary statutes potentially triggering the ACCA enhancement for any crime following a trespass underscores the importance of the issue and the need for its resolution.

II. The Sixth Circuit's Approach To Generic Burglary Has Widespread And Serious Practical Consequences.

A. Interpretation Of The "Remaining In" Element Of Generic Burglary Affects All State Burglary ACCA Predicates.

The Michigan home invasion statute at issue here squarely implicates the circuit split over contemporaneous intent, and is illustrative of the larger problem. *See* Mich. Comp. Laws § 750.110a(4)(a) (making it a crime to "enter[] a dwelling without permission and, at any time while ... entering, *present in*, or exiting the dwelling, commit[] a misdemeanor" (emphasis added)).

As shown above, the Fourth, Sixth, Ninth, and Tenth Circuits have held, based on the "remaining in" language in *Taylor*, that generic burglary does not have an "intent-at-entry" requirement *at all*. *See, e.g.*,

Pet. App. 8a. Instead, generic burglary, through the "remaining in" language, transforms any crime committed while trespassing into burglary under the theory that "someone who enters a building ... and, while inside, commits ... a felony will necessarily have remained inside ... to do so." Pet. App. 8a (quoting *Priddy*, 808 F.3d at 685). Thus, the Sixth Circuit held in this case that the Michigan statute's requirements of unauthorized entry plus subsequent commission of a crime while "present in" the structure correspond to the elements of generic burglary as set out in *Taylor*. This provision and the decision below reconfirm that the issue here pertains to a wide swath of state burglary laws involving "remaining in" or equivalent language.

B. ACCA Mandatory Minimums Are Common And Are Frequently Predicated On State Burglary Offenses.

The question presented arises in a substantial number of criminal prosecutions involving prior burglary convictions.

ACCA's 15-year mandatory minimum sentence for career criminals is applied in hundreds of cases each year; in recent years, approximately 15% of defendants convicted of a firearm offense carrying a mandatory minimum have qualified as an Armed Career Criminal under 18 U.S.C. § 924(e). *See* U.S. Sentencing Comm'n, *Quick Facts: Mandatory Minimum Penalties* 2 (2015), https://tinyurl.com/y7z5w9dj (sentencing data for 2015); U.S. Sentencing Comm'n, *Quick Facts: Mandatory Minimum Penalties* 2 (2016),

https://tinyurl.com/ybpwlwnn (sentencing data for 2016).

And as the government has explained elsewhere, "[b]urglary is ... a frequently-used ACCA predicate." Gov't Pet. for Reh'g En Banc at 6, *United States v. Morris*, 836 F.3d 931 (8th Cir. 2016) (No. 14-3336). Indeed, many of this Court's most substantial ACCA opinions in recent years have involved burglary predicates. *See Mathis*, 136 S. Ct. at 2246 (addressing Iowa burglary convictions); *Descamps v. United States*, 133 S. Ct. 2276, 2282 (2013) (addressing California burglary convictions); *Johnson*, 559 U.S. at 136 (noting Florida burglary conviction, although it was not the predicate in dispute); *James v. United States*, 550 U.S. 192, 196 (2007) (addressing Florida burglary convictions).

Because of the frequency with which the government seeks mandatory minimums under ACCA and the frequency with which burglary offenses serve as ACCA predicates, the government itself has recently urged that the question of "when the formation of criminal intent must occur for purposes of generic burglary" is a "substantial" one. Gov't Mot. to Stay Mandate Pending Filing of Pet. for Writ of Cert. at 4, *United States v. Morris*, 850 F.3d 925 (8th Cir. 2017) (No. 14-3336). The government's assessment is plainly correct, and further highlights the need for this Court's review.

C. The Sixth Circuit's Approach Greatly Expands The Scope Of Conduct That Will Trigger Mandatory Minimum Sentences Under ACCA.

The question presented is important for another reason: The Sixth Circuit's interpretation of the "remaining in" element of generic burglary, shared by the Fourth, Ninth, and Tenth Circuits, improperly and very substantially broadens the scope of conduct triggering ACCA mandatory minimums.

The Sixth Circuit has candidly acknowledged the scope of its ruling: Anyone "who enters a building ... and, while inside, commits or attempts to commit a felony will necessarily have remained inside the building ... to do so." Pet. App. 8a (quoting *Priddy*, 808 F.3d at 685). In other words, any crime committed while trespassing is generic burglary.

The practical consequence of this position, in terms of the scope of conduct triggering ACCA mandatory minimum sentences, is staggering. Consider Petitioner's example of "a hiker who enters an unoccupied cabin for protection from the cold and only later opportunistically decides to take food or supplies," Pet. 23, or the Fifth Circuit's example of "teenagers who unlawfully enter a house only to party, and only later decide to commit a crime," *Herrera-Montes*, 490 F.3d at 392. In neither example is there any intent to commit a further crime at the time of the initial trespass, but under the Sixth Circuit's approach, these acts nonetheless constitute generic burglary because such intent developed at some later point *during* the trespass. Similarly, the Fourth Circuit has

recognized that its conception of generic burglary would reach "a homeless person who unlawfully enters a home only to seek warmth, but while inside, forms an intent to steal property." *Bonilla*, 687 F.3d at 193.

These examples are not mere hypotheticals. In *People v. Gaines*, 546 N.E.2d 913 (N.Y. 1989), the defendant testified at trial that he had "left the homeless shelter where he had been staying, because he had inadequate funds to remain there, ... walked ... until he reached [a] building supply company, pushed in a window and entered the building for refuge from the cold and heavy snow that fell that night." *Id.* at 914. While in the building, the defendant "put on [a] jacket and coveralls to keep warm." *Id.* He was arrested after leaving the building, still wearing the jacket and overalls he had taken from inside the building. *Id.*

Luckily for the defendant in *Gaines*, the New York Court of Appeals overturned his burglary conviction, adopting the same interpretation of the "remaining in" language in the New York burglary statute, N.Y. Penal Law § 140.20, as the Fifth and Eighth Circuits have adopted with respect to the "remaining in" language in *Taylor*. *Id.* at 915-16. But in a state whose burglary statute has been interpreted differently, along the lines of the Sixth Circuit's decision here, the conviction would stand. And in the Sixth Circuit (and the Fourth, Ninth, and Tenth Circuits), that conviction could be deployed as an ACCA predicate to trigger a 15-year mandatory minimum sentence. Such a

result is profoundly unjust and, in light of the entrenched circuit split, the question calls for this Court's intervention.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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December 28, 2017

No. 17-778

In the Supreme Court of the United States

JAMAR ALONZO QUARLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
v.	)	Case 1:14-cr-29 (RJJ)
JAMAR ALONZO QUARLES,	)	
Defendant.	)	

RELEVANT DOCKET ENTRIES

No.	Filed	Docket Text
1	02/26/2014	INDICTMENT as to Jamar Alonzo Quarles (ald) (Entered: 02/26/2014)
15	06/20/2014	MOTION regarding enhancement with brief in support by Jamar Alonzo Quarles (Attachments: # 1 Attachment 1 - Court Records) (Kaczor,

No.	Filed	Docket Text
		David) Modified text on 6/23/2014 (mrs). (Entered: 06/20/2014)
16	06/24/2014	ORDER TO CONTINUE - ends of justice continuance as to defendant Jamar Alonzo Quarles; jury trial reset for 9/23/2014 at 8:30 AM at 699 Federal Building, Grand Rapids, MI before Judge Robert J. Jonker; final pretrial conference reset for 9/11/2014 at 4:00 PM at 699 Federal Building, Grand Rapids, MI before Judge Robert J. Jonker; Defendant shall file brief not later than 7/7/2014 re ACCA question; government may file response not later than 7/21/2014; signed by Judge Robert J. Jonker (Judge Robert J. Jonker, ymc) (Entered: 06/24/2014)
17	07/07/2014	RESPONSE *to Court Order* by Jamar Alonzo Quarles re 15 (Kaczor, David) (Entered: 07/07/2014)
18	07/21/2014	BRIEF *In Response to R.17 as permitted by R.16* by USA as to defendant Jamar Alonzo Quarles re 16 (Lewis, Sean)

No.	Filed	Docket Text
		(Entered: 07/21/2014)
19	08/06/2014	ORDER denying motion regarding enhancement 15 as to Jamar Alonzo Quarles (1); signed by Judge Robert J. Jonker (Judge Robert J. Jonker, ymc) (Entered: 08/06/2014)
21	09/09/2014	MINUTES of CHANGE OF PLEA as to defendant Jamar Alonzo Quarles plead guilty to count(s) Count 1 of the Indictment held before Judge Robert J. Jonker (Court Reporter: Glenda Trexler) (Judge Robert J. Jonker, mil) (Entered: 09/09/2014)
23	12/24/2014	(RESTRICTED ACCESS) INITIAL PRESENTENCE REPORT as to Jamar Alonzo Quarles; an objection meeting, if necessary, is scheduled for January 7, 2015, at 10:00 a.m., in Grand Rapids with this U.S. Probation Officer [Access to this document is available to the Court and attorney(s) for USA, Jamar Alonzo Quarles only] (USPO Griffis, Rich) (Entered:

No.	Filed	Docket Text
		12/24/2014)
24	12/31/2014	(RESTRICTED ACCESS) OBJECTION/RESPONSE to presentence report 23 by USA [Access to this document is available to the Court and attorney(s) for USA, Jamar Alonzo Quarles only] (Lewis, Sean) (Entered: 12/31/2014)
25	01/15/2015	(RESTRICTED ACCESS) FINAL PRESENTENCE REPORT as to Jamar Alonzo Quarles [Access to this document is available to the Court and attorney(s) for USA, Jamar Alonzo Quarles only] (USPO Griffis, Rich) (Entered: 01/15/2015)
26	01/20/2015	SENTENCING MEMORANDUM by USA as to Jamar Alonzo Quarles (Attachments: # 1 Exhibit 1) (Lewis, Sean) Modified text on 1/21/2015 (mrs). (Entered: 01/20/2015)
29	01/21/2015	SENTENCING MEMORANDUM by Jamar Alonzo Quarles (Kaczor, David) Modified text on 1/22/2015 (jlg). Modified text

No.	Filed	Docket Text
		on 1/23/2015 per Order 31 (mrs). (Entered: 01/21/2015)
32	01/29/2015	RESPONSE by USA as to defendant Jamar Alonzo Quarles re 29 (Lewis, Sean) Modified text on 1/30/2015 (mrs). (Entered: 01/29/2015)
36	02/13/2015	MINUTES of SENTENCING for Jamar Alonzo Quarles (1), Count(s) 1, 204 months incarceration; 5 years supervised release; $2,500 fine; and $100 mandatory special assessment; defendant advised of right to appeal; held before Judge Robert J. Jonker (Court Reporter: Glenda Trexler) (Judge Robert J. Jonker, mil) (Entered: 02/13/2015)
37	02/17/2015	JUDGMENT as to defendant Jamar Alonzo Quarles; signed by Judge Robert J. Jonker (Judge Robert J. Jonker, ymc) (Entered: 02/17/2015)
38	02/18/2015	NOTICE OF APPEAL by Jamar Alonzo Quarles re Judgment 37 (Kaczor, David) (Entered: 02/18/2015)
	02/23/2015	CASE NUMBER 15-1161

No.	Filed	Docket Text
		assigned by the Sixth Circuit to appeal 38 as to defendant Jamar Alonzo Quarles (mkc) (Entered: 03/05/2015)
39	03/05/2015	APPEAL TRANSCRIPT of Plea Hearing as to defendant Jamar Alonzo Quarles held 09/09/2014 before Hon. Robert J. Jonker re appeal 38; NOTE: this transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the release of transcript restriction date; after that date it may be obtained through PACER; under the Policy Regarding Transcripts the parties have 14 days within which to file a Notice of Intent to Request Redaction, and 21 days within which to file a Redaction Request; if no Redaction Request is filed, the court will assume redaction of personal identifiers is not necessary and this transcript will be made available via PACER after the release of transcript restriction set for 6/3/2015; redaction request due 3/26/2015 (Court Reporter: Trexler,

No.	Filed	Docket Text
		Glenda (517)819-0396) (Entered: 03/05/2015)
40	03/05/2015	APPEAL TRANSCRIPT of Sentencing Hearing as to defendant Jamar Alonzo Quarles held 02/13/2015 before Hon. Robert J. Jonker re appeal 38; NOTE: this transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the release of transcript restriction date; after that date it may be obtained through PACER; under the Policy Regarding Transcripts the parties have 14 days within which to file a Notice of Intent to Request Redaction, and 21 days within which to file a Redaction Request; if no Redaction Request is filed, the court will assume redaction of personal identifiers is not necessary and this transcript will be made available via PACER after the release of transcript restriction set for 6/3/2015 ; redaction request due 3/26/2015 (Court Reporter: Trexler, Glenda (517)819-0396) (Entered:

No.	Filed	Docket Text
		03/05/2015)
43	03/21/2016	ORDER of USCA (certified copy) as to Jamar Alonzo Quarles re Notice of Appeal - Final Judgment 38 *vacating district court's judgment and remanding to district court for resentencing*; mandate to issue (clp) (Entered: 03/21/2016)
45	03/28/2016	SENTENCING MEMORANDUM by USA as to Jamar Alonzo Quarles (Attachments: # 1 Attachment 1) (Lewis, Sean) (Entered: 03/28/2016)
49	04/13/2016	MANDATE of USCA (certified copy) as to Jamar Alonzo Quarles re Notice of Appeal - Final Judgment 38 (clp) (Entered: 04/14/2016)
50	05/04/2016	SENTENCING MEMORANDUM by Jamar Alonzo Quarles *Upon Remand* (Tosic, Jasna) (Entered: 05/04/2016)
55	05/13/2016	CHARACTER REFERENCE LETTER(S) (*Notice of Filing Certificates of Achievement*) re Jamar Alonzo Quarles

No.	Filed	Docket Text
		(Attachments: # 1 Attachment Certificates) (Tosic, Jasna) Modified text on 5/13/2016 (clp) (Entered: 05/13/2016)
56	05/16/2016	MINUTES of remand hearing as to defendant Jamar Alonzo Quarles held before Chief Judge Robert J. Jonker (Court Reporter: Glenda Trexler) (Chief Judge Robert J. Jonker, sdb) (Entered: 05/16/2016)
57	05/17/2016	AMENDED JUDGMENT as to defendant Jamar Alonzo Quarles; signed by Chief Judge Robert J. Jonker (Chief Judge Robert J. Jonker, ymc) (Entered: 05/17/2016)
58	05/17/2016	(RESTRICTED ACCESS) STATEMENT OF REASONS re 57 as to Jamar Alonzo Quarles [Access to this document is available to the Court and attorney(s) for USA, Jamar Alonzo Quarles only] (Chief Judge Robert J. Jonker, ymc) (Entered: 05/17/2016)
59	05/18/2016	NOTICE OF APPEAL by Jamar Alonzo Quarles re Judgment - Amended 57 (Tosic, Jasna) (Entered:

No.	Filed	Docket Text
		05/18/2016)
	06/10/2016	CASE NUMBER 16-1690 assigned by the Sixth Circuit to appeal 59 as to defendant Jamar Alonzo Quarles (mkc) (Entered: 06/23/2016)
60	06/20/2016	APPEAL TRANSCRIPT of Resentencing Hearing as to defendant Jamar Alonzo Quarles held 05/16/2016 before Hon. Robert J. Jonker re appeal 59; NOTE: this transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the release of transcript restriction date; after that date it may be obtained through PACER; under the Policy Regarding Transcripts the parties have 14 days within which to file a Notice of Intent to Request Redaction, and 21 days within which to file a Redaction Request; if no Redaction Request is filed, the court will assume redaction of personal identifiers is not necessary and this transcript will be made available via PACER after the release of transcript restriction

No.	Filed	Docket Text
		set for 9/19/2016 ; redaction request due 7/11/2016 (Court Reporter: Trexler, Glenda (517)819-0396) (Entered: 06/20/2016)
61	03/10/2017	SLIP OPINION and JUDGMENT of USCA as to Jamar Alonzo Quarles re appeal 59 affirming the district court's decision; mandate to issue (pjw) Modified text on 3/10/2017 (pjw). (Entered: 03/10/2017)
62	07/07/2017	MANDATE of USCA (certified copy) as to Jamar Alonzo Quarles re Notice of Appeal - Final Judgment 59 (mg) (Entered: 07/07/2017)
63	11/30/2017	LETTER from Supreme Court of the United States that a petition for writ of certiorari was filed by defendant Jamar Alonzo Quarles on November 24, 2017 and assigned case number 17-778 re Notice of Appeal - Final Judgment 59 filed by defendant Jamar Alonzo Quarles (mg) (Entered: 12/01/2017)
64	01/11/2019	LETTER from Supreme Court

No.	Filed	Docket Text
		of the United States that the petition for writ of certiorari is granted re Notice of Appeal - Final Judgment 59 filed by defendant Jamar Alonzo Quarles (mg) (Entered: 01/18/2019)

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 15-1161

UNITED STATES OF AMERICA,
Plaintiff – Appellee
v.
JAMAR ALONZO QUARLES,
Defendant – Appellant.

RELEVANT DOCKET ENTRIES

No.	Filed	Docket Entry
1	02/19/2015	Criminal Case Docketed. Notice filed by Appellant Jamar Alonzo Quarles. Transcript needed: y. (CB) [Entered: 02/19/2015 11:05 AM]
9	04/02/2015	MOTION filed by Mr. Paul L. Nelson for Jamar Alonzo Quarles to hold briefing in abeyance pending Supreme Court decision in Johnson v. US (13-7120). Certificate of Service: 04/02/2015.--[Edited 04/03/2015 by PJE] (PLN)

No.	Filed	Docket Entry
		[Entered: 04/02/2015 02:50 PM]
10	04/03/2015	ORDER filed GRANTING appellant's motion to hold case in abeyance [9] filed by Mr. Paul L. Nelson. Briefing in abeyance and requiring appellant to file status report every sixty days. Status report due 06/04/2015. (PJE) [Entered: 04/03/2015 01:22 PM]
11	04/03/2015	RULING to hold case in abeyance pending other litigation. Supreme Court decision in Johnson v. US (PJE) [Entered: 04/03/2015 01:41 PM]
17	09/08/2015	APPELLANT BRIEF filed by Mr. Paul L. Nelson for Jamar Alonzo Quarles. Certificate of Service: 09/08/2015. Argument Request: requested. (PLN) [Entered: 09/08/2015 05:00 PM]
20	11/04/2015	APPELLEE BRIEF filed by Mr. Sean M. Lewis for USA. Certificate of Service: 11/04/2015. Argument Request: requested. (SML) [Entered: 11/04/2015 08:26 AM]

No.	Filed	Docket Entry
23	12/14/2015	REPLY BRIEF filed by Attorney Mr. Paul L. Nelson for Appellant Jamar Alonzo Quarles. Certificate of Service: 12/14/2015. (PLN) [Entered: 12/14/2015 04:29 PM]
24	12/16/2015	ADDITIONAL CITATION filed by Mr. Sean M. Lewis for USA. Certificate of Service: 12/16/2015. (SML) [Entered: 12/16/2015 04:43 PM]
26	01/05/2016	ADDITIONAL CITATION filed by Mr. Paul L. Nelson for Jamar Alonzo Quarles. Certificate of Service: 01/05/2016. (PLN) [Entered: 01/05/2016 04:20 PM]
29	01/26/2016	CAUSE SUBMITTED on briefs to panel consisting of Judges Boggs, Siler and Batchelder. (KSC) [Entered: 03/17/2016 10:39 AM]
30	03/21/2016	Per Curiam OPINION filed: The district court's judgment is VACATED and this matter is REMANDED to the district court for resentencing, decision not for publication. Danny J. Boggs, Circuit Judge; Eugene E. Siler, Jr.,

No.	Filed	Docket Entry
		Circuit Judge and Alice M. Batchelder, Circuit Judge. (CB) [Entered: 03/21/2016 08:40 AM]
31	04/13/2016	MANDATE ISSUED with no costs taxed. (CB) [Entered: 04/13/2016 03:16 PM]

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 16-1690

UNITED STATES OF AMERICA,
Plaintiff – Appellee,
v.
JAMAR ALONZO QUARLES,
Defendant – Appellant.

RELEVANT DOCKET ENTRIES

No.	Filed	Docket Entry
1	05/27/2016	Criminal Case Docketed. Notice filed by Appellant Jamar Alonzo Quarles. Transcript needed: y. (LAJ) [Entered: 05/27/2016 11:29 AM]
15	09/26/2016	APPELLANT BRIEF filed by Mr. Paul L. Nelson for Jamar Alonzo Quarles. Certificate of Service: 09/26/2016. Argument Request: requested. (PLN) [Entered: 09/26/2016 04:42 PM]

No.	Filed	Docket Entry
18	10/28/2016	ADDITIONAL CITATION filed by Mr. Paul L. Nelson for Jamar Alonzo Quarles. Certificate of Service: 10/28/2016. (PLN) [Entered: 10/28/2016 02:37 PM]
19	11/08/2016	APPELLEE BRIEF filed by Mr. Sean M. Lewis for USA. Certificate of Service: 11/08/2016. Argument Request: not requested. (SML) [Entered: 11/08/2016 11:16 AM]
28	01/17/2017	CAUSE SUBMITTED on briefs to panel consisting of Judges Siler, Moore and Griffin. (KSC) [Entered: 03/08/2017 10:55 AM]
22	02/01/2017	REPLY BRIEF filed by Attorney Mr. Paul L. Nelson for Appellant Jamar Alonzo Quarles. Certificate of Service: 02/01/2017. (PLN) [Entered: 02/01/2017 04:50 PM]
25	02/28/2017	ADDITIONAL CITATION filed by Mr. Paul L. Nelson for Jamar Alonzo Quarles. Certificate of Service: 02/28/2017.

No.	Filed	Docket Entry
		(PLN) [Entered: 02/28/2017 04:53 PM]
27	03/02/2017	RESPONSE in opposition filed regarding an additional citation, [25]. Response from Attorney Mr. Sean M. Lewis for Appellee USA. Certificate of Service: 03/02/2017. (SML) [Entered: 03/02/2017 02:06 PM]
29	03/10/2017	OPINION and JUDGMENT filed: AFFIRMED. Decision for publication. Eugene E. Siler, Jr. (AUTHORING), Karen Nelson Moore, and Richard Allen Griffin, Circuit Judges. (CL) [Entered: 03/10/2017 11:35 AM]
30	03/24/2017	PETITION for en banc rehearing filed by Mr. Paul L. Nelson for Jamar Alonzo Quarles. Certificate of Service: 03/24/2017. (PLN) [Entered: 03/24/2017 03:51 PM]
31	04/11/2017	LETTER SENT to Mr. Sean M. Lewis for USA, notifying that he is directed to respond to the petition for en banc rehearing filed by Mr. Paul L.

No.	Filed	Docket Entry
		Nelson. Response due 04/25/2017. (BLH) [Entered: 04/11/2017 01:35 PM]
33	04/25/2017	RESPONSE to petition for en banc rehearing, [30], previously filed by filed by Mr. Paul L. Nelson in 16-1690. Response filed by Ms. Jennifer L. McManus for USA. Certificate of service: 04/25/2017. (JLM) [Entered: 04/25/2017 01:53 PM]
34	06/27/2017	MOTION filed by Mr. Paul L. Nelson for Jamar Alonzo Quarles to file supplemental brief. Certificate of Service: 06/27/2017. (PLN) [Entered: 06/27/2017 04:32 PM]
35	06/28/2017	ORDER filed denying petition for en banc rehearing [30] filed by Mr. Paul L. Nelson. Eugene E. Siler , Jr., Karen Nelson Moore, and Richard Allen Griffin, Circuit Judges. (BLH) [Entered: 06/28/2017 01:22 PM]
36	07/07/2017	MANDATE ISSUED with no costs taxed. (LAJ) [Entered: 07/07/2017 10:57 AM]

No.	Filed	Docket Entry
37	11/30/2017	U.S. Supreme Court notice filed regarding a petition for a writ of certiorari filed by Appellant Jamar Alonzo Quarles. Supreme Court Case No:17-778, 11/24/2017. (ACB) [Entered: 11/30/2017 04:18 PM]
38	01/15/2019	U.S. Supreme Court letter filed granting the petition for a writ of certiorari [37] filed by Jamar Alonzo Quarles. Supreme Court Case No: 17-778, 01/11/2019. (CL) [Entered: 01/15/2019 02:46 PM]

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	**INDICTMENT**
JAMAR ALONZO QUARLES,	)	
Defendant.	)	

The Grand Jury charges:

(Felon in Possession of a Firearm)

On or about August 24, 2013, in Kent County, in the Southern Division of the Western District of Michigan,

JAMAR ALONZO QUARLES,

being a person who had been convicted of one or more offenses punishable by imprisonment for a term exceeding one year under the laws of the State of Michigan, did knowingly possess a firearm: a loaded Charles Daly, .45 caliber semiautomatic pistol, in and affecting commerce.

18 U.S.C. § 922(g)(1)

18 U.S.C. § 921(a)
18 U.S.C. § 924(e)(1)

FORFEITURE ALLEGATION
(Felon in Possession of a Firearm)

The allegation contained in this Indictment is hereby re-alleged and incorporated by reference for the purpose of alleging forfeitures pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c).

Upon conviction of the offense in violation of 18 U.S.C. § 922(g) charged in this Indictment, the defendant,

JAMAR ALONZO QUARLES,

shall forfeit to the United States, pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c), any firearms and ammunition involved in the commission of the offense, including, but not limited to: a loaded Charles Daly, .45 caliber semiautomatic pistol.

18 U.S.C. § 924(d)
28 U.S.C. § 2461(c)
18 U.S.C. § 924(e)(1)18 U.S.C. § 922(g)(1)

A TRUE BILL

/s/
GRAND JURY FOREPERSON

PATRICK A. MILES, JR.
United States Attorney

/s/
SEAN C. MALTBIE
Assistant United States Attorney

APPENDIX E

STATE OF MICHIGAN DISTRICT COURT CIRCUIT COURT 61	INFORMATION FELONY MH	CASE NO. DISTRICT NO. CIRCUIT CT.

THE PEOPLE OF THE STATE OF MICHIGAN V JAMAR ALONZO QUARLES 41 01 236725 99 DOB: 05/16/80 Defendant	OFFENSE INFORMATION	
	Date 06/13/01	Police agency report no. GR0158347
	City/Twp./Village and County in Michigan 1189 STONEBROOK CT NE, GRAND RAPIDS	
	Complaining witness BRIAN GROOMS	
Charge(s) HOME INVASION 3RD	Victim(s) or Complainant(s) CARLA ANN WINTERINGHAM	

Witnesses

MARLA RIETH	PHIL NEVINS	BRIAN GROOMS
CARLA ANN WINTERINGHAM	CASEY GREG	THOMAS MARTIN ZINK
TIFFANY SEYMORE	LISA LINGENBERG	

STATE OF MICHIGAN, COUNTY OF KENT.

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: The Prosecuting Attorney for this County appears before the court and informs the court that on the date and at the location above described, the Defendants(s):

JAMAR ALONZO QUARLES did break and enter, or did enter without permission, a dwelling located at 1189 STONEBROOK CT NE, WITH THE INTENT TO COMMIT AN ASSAULT, A MISDEMEANOR THEREIN OR AND, WHILE ENTERING, PRESENT IN, OR EXITING THE DWELLING DID COMMIT AN ASSAULT, A MISDEMEANOR; contrary to MCL 750.110a(4); NISA 28.305(a)(4).

FELONY: 5 Years and/or $2,000.00 [750.110A4]

and against the peace and dignity of the State of Michigan.

Prosecuting Attorney

Date

By: /s/_____

STATE OF MICHIGAN JUDICIAL DISTRICT 17TH JUDICIAL CIRCUIT	JUDGMENT OF SENTENCE ☐ COMMITMENT TO JAIL	CASE NO. 01-08617-FH

ORI MI-410025J Police Report No.	Court address 180 Ottawa Ave., NW, Grand Rapids, MI 49503	Court telephone no.

THE PEOPLE OF ☐ The State of Michigan ☐_____ _____	V	Defendant's name, address, and telephone no. JAMAR ALONZO QUARLES		
		CTN 41 01 236725 99	SID 2036193H	DOB 5/16/80

THE COURT FINDS:

1. Defendant was found guilty on 11/14/01 of the crime(s) as stated below:

Count	CONVICTED BY			CRIME	CHARGE CODE(S)
	Plea*	Court	Jury		MCL citation/PACC Code
	NC			HOME INV 3	750.110A4

*Plea: insert "G" for guilty plea; use "NC" for nolo contendere; use "MI" for guilty but mentally ill.

2. Defendant
☒ represented by an attorney: D. CARLSON
☐ advised of right to counsel and appointed counsel and knowingly, intelligently, and voluntarily waived that right.

☐ 3. Conviction reportable to Secretary of State**. Defendant's driver license number is: _____

☐ 4. Licensing sanction reportable to State Police**.
☐ Revoked ☐ Suspended ____ days
☐ Restricted ____ days

☐ 5. HIV testing was ordered on _____. Confidential test results are on file. **(see back)

IT IS ORDERED:

☐ 6. Defendant is sentenced to jail as follows:

☐ Report at ____ m.

Count	Date Sentence Begins	Sentenced		Credited		To Be Served		Release Authorized for the Following Purpose	Release Period	
		Mos.	Days	Mos.	Days	Mos.	Days		From	To
	8/7/01	12			156			☐ Upon payment of fine and costs ☐ To work or seek work ☐ For attendance at school ☐ For medical treatment ☐ Other		

7. Defendant shall pay as follows:

Count	Fine	Costs	Restitution	Crime Victim	Other (specify)	Total	Due Date	Jail for Failure to Pay on Time
		600.00	332.50	60.00				☐ Beginning ____ serve ___ days

Fine, costs, and fees not paid within 56 days of the due date are subject to a 20% late penalty on the amount owed. If a cash bond/bail was personally deposited by defendant, payment toward the total is to first be collected out of that bond/bail.

☒ 8. Defendant shall be placed on probation for 30 months and abide by the terms of probation. (See separate order.)

☐ 9. Defendant shall complete the following rehabilitative services.

☐ Alcohol Highway Safety Education ☐ Treatment (☐ outpatient, ☐ inpatient, ☐ residential, ☐ mental health.)

Specify:

☐ 10. Other:

1-9-02	(SEAL)	/s/	JRL 1621 PG 0844
Date		Judge	Bar No.

Under MCL 769.16a the clerk of the court shall send a copy of this order to the Michigan State Police Central Records Division to create a criminal history record.

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,	JUDGMENT IN A CRIMINAL CASE
	Case Number: 1:14-CR-29-01
v.	USM Number: 18038-040
JAMAR ALONZO QUARLES,	David L. Kaczor and Jasna Tosic Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to the one-count Indictment.
☐ pleaded nolo contendere to Count(s) ___, which was accepted by the court.
☐ was found guilty on Count(s) ___ after a plea of not guilty.

The defendant is adjudicated guilty of these offense(s):

Title & Section	Offense Ended	Count No.
18 U.S.C. § 922(g)(1), 924(a)(2) and 924(e)(1)	8/24/13	1

Nature of Offense

Felon in Possession of a Firearm

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Dated: February 17, 2015

Date of Imposition of Sentence: February 13, 2015

/s/ Robert J. Jonker
ROBERT J. JONKER
UNITED STATES
DISTRICT JUDGE

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of two hundred-four (204) months.

☒ The Court makes the following recommendations to the Bureau of Prisons:

The defendant be evaluated for substance abuse and provided treatment, if necessary.

The defendant be evaluated for mental health counseling and provided treatment, if necessary.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The Defendant shall surrender to the United States Marshal for this district:

- ☐ At _____ on _____.
- ☐ As notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ Before 2:00 P.M. on _____.
- ☐ As notified by the United States Marshal.
- ☐ As notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ To _____

At_____, with a certified copy of this judgment.

_____

United States Marshal

By: _____

Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **five (5) years.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer.

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) As directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.

☐ The defendant shall participate in an approved program for domestic violence.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;

7. The defendant shall refrain from all use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where

controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate in a program of testing and treatment for substance abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer, and shall pay at least a portion of the cost according to his ability, as determined by the probation officer.

2. The defendant shall participate in a program of mental health treatment, which may include cognitive restructuring programming (MRT), as directed by the probation officer, until such time as the defendant is released from the program by the probation officer, and shall pay at least a portion of the cost according to his ability, as determined by the probation officer.

3. The defendant shall provide the probation officer with access to any requested financial information.

4. The defendant shall maintain full-time employment as approved by the probation officer.

CRIMINAL MONETARY PENALTIES[1]

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on the following pages.

Assessment	Fine	Restitution
$100.00	$2,500.00	-0-

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss	Restitution Ordered	Priority or Percentage

☐ Restitution amount ordered pursuant to plea agreement: $

☐ The defendant must pay interest on restitution and/or a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after

---

[1] Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options in the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The Court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the fine.

☐ the interest requirement is waived for the restitution.

☐ The interest requirement for the fine is modified as follows:

☐ the interest requirement for the restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of **$100.00** due immediately, balance due
☐ not later than _____, or
☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F, below; or

B ☐ Payment to begin immediately (may be combined with C, D, or F, below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment, or

D ☐ Payment in equal _____(e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

The fine is to be paid in minimum quarterly

installments of $25.00 based on IFRP participation, or minimum monthly installments of $20.00 based on UNICOR earnings, during the period of incarceration, to commence 60 days after the date of this judgment. Any balance due upon commencement of supervision shall be paid, during the term of supervision, in minimum monthly installments of $25.00 to commence 60 days after release from imprisonment. The defendant shall apply all monies received from income tax refunds, lottery winnings, judgments, and/or any other anticipated or unexpected financial gains to any outstanding court-ordered financial obligations.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court, 399 Federal Building, 110 Michigan N.W., Grand Rapids, MI 49503, unless otherwise directed by the court, the probation officer, or the United States Attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Joint and Several Amount, and corresponding payee, if appropriate:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States: Charles Daly, .45 caliber semiautomatic pistol

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	
v.	Docket No.: 1:14-cr-29
JAMAR ALONZO QUARLES, Defendant.	

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE
ROBERT J. JONKER
UNITED STATES DISTRICT JUDGE
GRAND RAPIDS, MICHIGAN
February 13, 2015

Court Reporter: Glenda Trexler
Official Court Reporter
United States District Court 685
Federal Building
110 Michigan Street, N.W.
Grand Rapids, Michigan 49503

Proceedings reported by stenotype, transcript produced by computer-aided transcription.

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* * * * *

Grand Rapids, Michigan
February 13, 2015
11:10 a.m.

P R O C E E D I N G S

THE COURT: All right. We're here on the case of the United States against Jamar Quarles, 1:14-cr-29. It's the time set for sentencing.

Let's start appearances, please.

MR. LEWIS: Good morning, Your Honor, Sean Lewis [3] appearing on behalf of the United States. I'm joined by Special Agent Kubiak with the ATF.

THE COURT: All right.

MR. KACZOR: Good morning, Your Honor, David Kaczor and Jasna Tosic from the Federal Defenders Office on behalf of Mr. Quarles who is present and seated to my right.

THE COURT: Okay. Thank you.

I have from our first sentencing hearing all the same materials that I had, and I haven't seen anything new. So anything more from the government?

MR. LEWIS: No, Your Honor.

THE COURT: Or anything more in writing from the defense?

MR. KACZOR: No, Your Honor. Thank you.

THE COURT: Okay. And that was the reason we adjourned last time was because each of the parties had submitted an opening sentencing memorandum that addressed, among other things, the armed career criminal enhancement, which is a significant driver here of both guidelines and penalty ranges. The government filed a response to that shortly before the hearing, like the day or so before. And Mr. Kaczor wanted time to go through that with other people in his office who had been assisting in the research, and I certainly thought that was appropriate and the appropriate way to give everybody the opportunity to deal with the issues on [4] the same footing.

So with that, if there's nothing else new, I think what we ought to do is go into the sentencing issues. There isn't a plea agreement to think about. So what

I'd like to do is just ask each party to address their position on the Armed Career Criminal Act. I think I want to start with that. Once we get a ruling on that, then we can go on to the other sentencing issues.

So it's your objection, Mr. Kaczor or Ms. Tosic. Whoever is going to make the argument, I'd invite you to do that now.

MR. KACZOR: Thank you, Your Honor.

MS. TOSIC: We have filed a sentencing memorandum which in detail sets out our arguments. I'll try to be brief at this time. Just some main points from our brief.

THE COURT: All right. And I will say both sides have done a nice job, I think, of pulling together the relevant authority. But I do want to give each side a chance to highlight the key points from their perspective.

Go ahead.

MS. TOSIC: Mr. Quarles convicted of a Michigan offense home invasion in the third degree, and this offense can qualify as a violent felony in one of the two ways: If it's considered a generic burglary or if it qualifies under residual clause.

[5] Generic -- it does not qualify as a generic burglary for two main reasons. The Supreme Court in Taylor specifically stated what the elements of a generic burglary are.

THE COURT: What do I do as a district judge, in your opinion, with Horton and Gibbs from the Sixth Circuit? Because even if I think you're right or that you have the better of it, it seems like at least in an unpublished case, Horton, the Sixth Circuit says

Michigan third is categorically a crime of violence, it's categorical burglary. And Gibbs in a published case, I think, says it for Michigan second degree in 2010. And I think your argument, if it's right, would apply to both. I mean, then both Gibbs and Horton would be wrong. And, I mean, you can say the Sixth Circuit got it wrong, but they don't like it when I say they got it wrong.

MS. TOSIC: Well, I think, for instance, in Horton, that was a case that predated Descamps.

THE COURT: Okay.

MS. TOSIC: And Descamps says we have to divide -- if the statute is divisible, we have to look at like each clause of the statute. And this was before -- Horton was before that, and it kind of just looked at the statute as a whole and did not engage in that analysis.

THE COURT: All right. So in your view what's changed is Descamps from the Supreme Court, and I'd have a chance, even as a district judge, to point that out and come to [6] a different conclusion?

MS. TOSIC: Yes.

THE COURT: Okay. Go ahead.

MS. TOSIC: So as I said in our brief, there are two main reasons why this offense doesn't qualify as a generic burglary. One is that there was no contemporaneous intent to commit a crime. And the Fourth Circuit that I could find -- actually five -- Fourth, sorry -- addressed this issue and the weight of authorities is to find that if there's no contemporaneous intent, the offense is not a generic burglary. That would be a Fifth Circuit case, Constante, United States versus Constante. And these cases are all cited in both my and

the government's brief. And a First Circuit case Peterson, Fourth Circuit case Martin, Seventh Circuit case Hampton.

One case cited by the government, United States versus Bonilla, which is also a Fourth Circuit case, found in a two-to-one decision that contemporaneous is not -- contemporaneous intent is not a requirement. But clearly more circuits do require that element.

And when we look at what the Supreme Court said, it clearly said there has to be breaking and entering with intent to commit a crime. And I think that we are -- courts are not at liberty to eliminate or dilute this element.

The second argument is the types of places that this offense encompasses. Generic burglary involves breaking into a [7] building or structure. And in Shepard the Supreme Court said the act makes burglary a violent felony only if committed in a building or enclosed spaces.

This offense involves breaking into a dwelling, but "dwelling" is defined very broadly to include structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter. So when we think about what can that be, what is a shelter, a shelter can be a car, it can be a boat, it can be a tent. And these are all places that the Supreme Court specifically excluded from the definition of burglary.

Also appurtenant structure attached to a building. So what can that be? That can be like, for instance, a carport. Sometimes people attach a carport to their house. Or they have like a garbage shed kind of a structure enclosed. Maybe not even fully enclosed, like

two or three sides where they put their garbage bins.

This would not occur to me, but a friend of mine right here in East Grand Rapids attached to his house has a chicken coop. I would not think of that, but I just happen to note it.

So these places are clearly not buildings, not enclosed spaces, and for that reason this offense is not generic burglary.

So now I would move into the residual clause, unless [8] the Court has some questions about it.

THE COURT: No.

MS. TOSIC: Okay. So residual clause -- my first argument is that residual clause is unconstitutionally vague. And I understand that a circuit precedent precludes that argument at this point, but the Supreme Court is going to hear arguments on this issue soon, so we just want to preserve that.

THE COURT: All right.

MS. TOSIC: The second -- home invasion third degree is not similar to enumerated offenses. So a residual clause basically says that an offense is a violent felony if it involves conduct that presents a serious potential risk of physical injury to another.

And in James the Supreme Court held that burglary, generic burglary, presents serious potential risk because it poses a risk of confrontation that can lead to violence.

But I think it's important to keep in mind that the Supreme Court stated that in the context of a true generic burglary, a burglary that has all of the elements, breaking and entering, building or structure, with intent to commit a crime. And just because the offense

involves some risk of confrontation should not be enough, which is what the First Circuit recognized in United States versus Farrell, 672 F.3d. 27. And it stated that such an argument -- that there was a possibility of confrontation. Such an argument [9] could be applied to almost any crime in which getting caught in an act escalates the potential for violence. We require a more fine-toothed approach.

After the James was decided, the year later in Begay the Supreme Court significantly narrowed the scope of residual clause and held that offense is a violent felony only if it involves similar risk of injury as enumerated offenses of burglary, arson, extortion, and offenses involving use of explosives.

So I think in order to fall under residual clause, this offense must contain elements that are truly comparable to a burglary so that the offense poses equivalent risk of physical injury.

And there are several reasons why the risk involved is less. And while I say them separately, I think it's important that we keep in mind that this is not alternative reason. We just look at how this offense is committed. So this offense can be committed by entering or without any intent to commit a crime. And that is a different type of offense than when the reason intends to commit a crime. Which is what the First Circuit recognized in Peterson and refused to include a Rhode Island breaking and entering offense because it lacked the element of intent to commit a crime.

The Court stated that it seems obvious that a person who breaks into a building intending to steal, rape, or murder [10] poses a greater risk of violence than one who breaks and enters without such intention.

So when we have an offender who is intruding in a space and who is determined and ready and prepared to commit a crime, I think that is a different kind of offender than just one who enters without permission and then kind of spots an opportunity and does some minor crime. This offender is more likely to abscond and defuse a situation so the risk of confrontation is less likely.

The other one is, again, places that are intruded. This offense can be committed by entering, as I said, a carport, a garbage shed, or a chicken coop. Which is very different than entering someone's home. I think that a risk of violent encounter in such a situation is far less likely. I mean, someone is not going to run out of their house to confront an intruder in a garbage bin as someone would confront an intruder in their own home.

The more likely response, as Justice Scalia stated in his dissenting opinion in James, is that the so-called confrontation between a burglar and a third party while the burglar is still outside the home is likely to consist of nothing more than the occupant yelling "Who's there?" from his window and the burglar is running away.

So given these differences, the risk of confrontation, the risk of violence and injury is less than in [11] generic burglary or offenses involving use of explosives or arson. And I think overall it's important to keep in mind what's the purpose of armed career criminal. The purpose is to apply to those offenders who repeatedly commit truly violent crime.

A person who enters, as I said for example, an unenclosed garbage shed attached to a house without any

intent to commit any kind of crime and then while there commits a minor crime, like for instance public urination, that is a far less likely -- far less serious offense than generic burglary.

Where a person enters a chicken coop attached to a structure or a shelter without intent to commit a crime and then while exiting takes a few eggs, that's a less crime, less-serious crime. Judge Rogers stated in dissenting opinion in the United States versus Phillips, "When pilfering a few stray eggs from the fenced yard of a chicken coop is considered violent, the term "violent" becomes unmoored from its meaning." So for all these reasons, this offense should not be found to be a violent felony.

THE COURT: Okay. Horton is unpublished Sixth Circuit, I realize, but still Sixth Circuit that says Michigan third-degree home invasion is also in the residual clause. And Descamps, as you said, might give you a reason to say the other part of Horton doesn't apply anymore that it's generically a burglary. Is there anything in your view that's [12] changed since Horton on the residual clause?

MS. TOSIC: Descamps also is -- Descamps is used -- applied to residual clause too. So there has to be a categorical approach also that we compare the elements of the offense with the elements of the generic offense. And because this is a divisible, we have to look at each possible way to commit Michigan home invasion third in Descamps.

So while there are parts of this statute, the Michigan statute that would qualify --

THE COURT: Okay.

MS. TOSIC: -- as a burglary and as -- under the

residual clause, part of it do not.

The other argument I would also say, the court in Horton did not consider all of the arguments that we are raising here. It did not consider that the offense doesn't have an intent. It did not -- intent to commit an offense. It did not consider that there are various places that can be entered into. And kind of just lumped it all together.

THE COURT: All right. Thank you. I appreciate it. Let me hear from Mr. Lewis for the government's position.

MR. LEWIS: Thank you, Your Honor. For the reasons that we have outlined in our briefing, we do believe that Michigan home invasion third degree is categorically a generic burglary. Horton says so, Fields, it's a district court case, [13] also says so. And Descamps didn't change the paradigm. Horton was still looking at -- contrary to what the defense implies, it didn't just look at the statute as a whole, it drilled in and said there's no part to recognize there are different ways to violate the statute and said we recognize that. And there is no variation on this. It doesn't qualify. So I really don't think Descamps does the defense any good here nor does it undermine Horton or Gibbs.

THE COURT: Well, apparently Judge Boggs thought so. At least in Prater he seemed to take a different approach than he did in the earlier cases. Prater is New York, it's a different statute, but what about that? I mean, to say it didn't change the paradigm --

MR. LEWIS: Because -- I'm sorry.

THE COURT: At least one of the authors of those earlier Horton/Gibbs -- I can't remember if he was on Horton or Gibbs or both -- but he certainly seemed to

take a different approach in Prater.

MR. LEWIS: Well, I guess I would answer that in two ways. One -- and what I meant, if one looks at the way the court went about analyzing the statute in Horton, it is fully consistent with what the Supreme Court said in Descamps. So it's not as if the approach in Descamps is inconsistent with what the Sixth Circuit did in Horton.

And then second, Prater actually strengthens our [14] argument. In that case -- again, I think it was the New York statute -- where that statute fell apart or failed to qualify was because it included a much broader array of places such as vehicles, enclosed motor trucks, and trailers that simply are not at issue here. Here Michigan statute is limited to dwellings.

And the defense says, Well, why couldn't that be a tent? Why couldn't it be -- we don't really know what it could be. But if you -- if you look at the definition in the statute, the common definitions that we cited from the dictionary, Michigan statute appeared to be more along the lines of the minor variations spoken of in Taylor than the broad, very broad set of places discussed in Prater or some of the other cases.

In terms of the argument that the statute doesn't qualify because there's no required intent at entry, again for the reasons that we've pointed out, I don't think that's accurate. Even Taylor that sets out the generic definition of burglary doesn't require intent at entry. The requirement there, the definition there, is entry or remaining in with intent. If somebody has gone in, broken and entered, and then forms the intent once they are inside, that's still sufficient to meet the generic definition set out in Taylor.

And the cases we cited, Horton and Bonilla, certainly stand for that proposition. The defense relies on Martin, but [15] that case really doesn't help them. That case in terms of the statute was pure breaking and entering with no requirement that a crime be committed inside.

And they also cited the case of Hampton. And again, there my recollection is that again it's the type of pure breaking and entering. And it says where that statute failed to meet the definition of generic burglary, because there was no intent required anywhere, it was just breaking and entering, it wasn't intent at entry or later on, which is the case in Michigan statute.

With regard to their argument that the risk of injury is not comparable -- and this is moving on to the residual clause -- because the statute includes it in its definition structures that are attached to a dwelling, that argument is simply inconsistent with James itself which dealt with curtilage and the Sixth Circuit case of Phillips.

And again their argument that the Michigan statute doesn't present a comparable risk of harm, it's inconsistent with the Sixth Circuit's opinions in Horton, Skipper, Brown, Moore. And even Martin, that Fourth Circuit case they rely on, the first half of that opinion rejects the very argument that they make here and say of course the risk is comparable. They just go on to the second half of the Begay analysis and under that statute said, well, it could be committed I think it was negligently, so it doesn't qualify. And I'm not sure if they [16] have abandoned or just are relying on their written pleadings that specific intent is required if a crime is to qualify under the residual clause. Again, that's simply inconsistent with the Sixth Circuit case of

Meeks. Begay did not impose that as a requirement. So we would submit that based on the Sixth Circuit -- the body of Sixth Circuit case law that the Court has in front of it with Horton, Gibbs, Meeks, and Phillips, this statute qualifies both as a generic burglary and in any event it qualifies under the residual clause. For those reasons we ask that the Court overrule the objection.

THE COURT: All right. Thank you.

Anything else, Ms. Tosic?

MS. TOSIC: No, Your Honor.

THE COURT: Okay. Well, again I want to thank the parties for their work on the briefing which was, I think, thorough. The arguments today have been good summaries. And the question is under the Armed Career Criminal Act whether or not in particular Mr. Quarles' prior conviction for Michigan home invasion third degree qualifies as a crime of violence. Obviously if it does, there's not only a guideline impact, there's a penalty range impact, and moving from a maximum 10 years under the normal felon-in-possession statutory terms to a minimum 15 years of imprisonment. So obviously the parties have properly focused considerable time and attention on this issue. And I've looked at it myself with care.

[17] I'm going to go in a way backwards and start with the residual clause, because in my mind this Michigan home evasion third definitely falls within the residual clause of the Armed Career Criminal Act, and I think for that reason alone we do have a proper predicate act in that earlier conviction, and then Mr. Quarles does qualify as an Armed Career Criminal Act -- under the Armed Career Criminal Act for that

treatment.

First of all, I think in my mind the risk under home invasion third in Michigan is plainly comparable to a traditional generic burglary in its most restrictive definition and to the other listed categorical crimes of violence. It's important, I think, to remember that Michigan still does require that the home invasion be to a "dwelling." And although I recognize and agree with the defense that the term "dwelling" is defined quite broadly in Michigan, and I would say could well include the kind of tent or perhaps even a boat or something like that -- we'll talk about that more in a minute on the other prong of the Armed Career Criminal Act -- it still requires some place of abode, either permanent or temporary. And I think that's key and that's critical. That's really what even the Supreme Court in James recognized as the key risk of generic burglary, namely, that risk of confrontation between the dweller, the person in that place of abode, even if it's a tent, and the perpetrator of the wrongdoing. So to me the risk is very similar, very hard to [18] distinguish, and for the reasons indicated falls within that prong of the residuary clause. I think that's what the case law has recognized as well as the government has cited within the circuit, including Phillips.

And I note even though the Sixth Circuit most recently in discussing the Prater or in deciding the Prater case under the New York statute came to a different conclusion, it's important to note the difference between the New York statute and the Michigan statute. Unlike Michigan, New York doesn't necessarily require occupation, and under those circumstances maybe you have a stronger argument, but that's not Michigan. Michigan does require a place of abode,

some occupation. And I think that is alone enough to keep it within the residuary clause.

Begay is another Supreme Court case that the defense has cited in noting that not only do you need the same type of risk but you need something in the words of Begay that's purposeful, violent, aggressive. And I do think that the Michigan home invasion third qualifies in all relevant ways with that. There's certainly purpose. There's certainly if not automatic violence in the way that you think of a fist hitting somebody in the face or a gun in the face, to violate somebody's dwelling is in fact one of the things that I think James recognizes makes the crime risky. You walk into somebody's place of abode, whether it's a tent or a mansion, [19] and you have confronted even in the outbuildings private space. And that is the kind of activity that I think fairly qualifies. Unlike the drunk driving that they were looking at in Begay. So I don't see that as any different.

And that really leads to the third reason that I have for finding this within the residuary clause, and that is I think that's what our circuit has squarely held in Horton for sure and certainly has alluded to that in comparable context for other similar statutes. And at least in my mind nothing since Horton has changed -- whether Descamps, Begay, or anything else -- that would detract from that holding, so I do believe that the residual clause covers this.

The defense has certainly argued that, well, under the residuary clause it can't be enough because that's void for vagueness. Our circuit has certainly rejected that. Case law is, I think, cited by both the government and even the defense recognizes that, so there's published authority to the contrary, including very recent

authority in this circuit. So I have to overrule the defense objection on that.

Of course, the Sixth Circuit -- or not the Sixth Circuit -- but the Supreme Court is going to look at the vagueness issue. It has that case on cert. And we'll see what they do.

That leads me to the question of whether a Michigan third-degree home invasion is also falling within the generic [20] burglary prong of the Armed Career Criminal Act.

On the one hand, if I were in the parties' positions I might say, "You ought to make at least a provisional ruling on that because who knows what's going to happen in the Sixth Circuit." On the other hand, I'm kind of concerned to do that, and I don't intend to do it. I'm going to make some comments but not make a final ruling for two reasons. One, I really do think this is a much closer case in light of Descamps in particular and what the Sixth Circuit did in Prater. And, number 2, although I know the Supreme Court has just granted cert on the vagueness issue under the residuary clause, part of me wonders if they can really manage a ruling that doesn't in some way impact both the categorical listings and the residuary clause. Whether, for example, if they find the residuary clause is void for vagueness, do they have a severance problem? Because honestly, for me, some of the most confusing literature in this area is on what qualifies as the generic listing. And if you have to compare under the residuary clause the crime of conviction to what qualifies as the generic listing, I'm not sure how you separate those two things. So I think the better course is to wait. We'll let the Supreme Court have its say, we'll see what the implications are, and if the residuary clause is voided

for vagueness, I'm sure this case will come back because I'm sure the defense will preserve its objections going up to the Sixth Circuit, and then we'll deal with [21] whatever the ground looks like then.

So just a couple quick comments. I think the parties have certainly highlighted the issues, and from the government's point of view Horton and Gibbs are already existing Sixth Circuit precedent that says the defense arguments on this generic burglary are wrong, that Michigan's third degree does qualify as a categorical and that Michigan second degree does too. And if the defense is right, Michigan's second degree wouldn't be a generic crime of burglary either.

I do think Descamps has changed the look, has at least forced the courts to say, with greater focus than they did prior, how can the particular offense of conviction be committed in all of its ways? You have to break down all pieces of it. And that means in the more minimal case for Michigan third, somebody could commit the crime without any intent as they are crossing the threshold to commit some other crime that could be formed while they are on the premises, number 1. And number 2, it could be a dwelling that's a very temporary structure, that doesn't fall within the building or structure as Taylor, the Supreme Court itself, required back in 1990. Under those circumstances I'm not so sure Michigan's third-degree home invasion qualifies anymore as a categorical crime of violence of generic burglary. I think it's a much closer case.

[22] And when I look at Prater and its analysis on the Descamps approach to a particular burglary or home invasion statute, I think it wouldn't be hard to imagine the defense argument prevailing. Particularly on the scope of what's covered by dwelling. I think it's

a little closer case and a tougher case for the defense on the intent, but that's another matter. And, again, if I'm not making a final decision on that today, I don't have to go further than that.

But I do think that we have a qualifying conviction. I don't think -- and we have it under the residuary clause. And I don't think that we have any vagueness issue that this Court can go with on the defense side of that coin.

So that's the ruling that I'm going to make on the Armed Career Criminal Act. It has both penalty range and guideline implications.

By my count there was one other guideline objection, namely to the scoring of the three points for the earlier domestic violence and malicious destruction convictions. I don't remember what paragraph that was.

But do you want to address that, Mr. Kaczor?

MR. KACZOR: Yes, Your Honor. It's paragraph 48.

THE COURT: All right. Thank you.

MR. KACZOR: Your Honor, let me begin by saying that it could appear that this is a moot question, because regardless of whether he receives three points for this [23] conviction, he's still going to be an armed career criminal. He's still going to be in category VI.

THE COURT: Right.

MR. KACZOR: On the other hand, in speaking with Mr. Quarles, he understands the use that the Bureau of Prisons will make of his presentence report, and they will look at the criminal history points. So he would like me to proceed.

And I think it's a real interesting objection. Interesting argument. And the argument is simply this: That Mr. Griffis scored him three criminal history points because he received an accumulated sentence of 480 days. Being more than 13 months, the guidelines say that he should receive three points for that.

Now, if it were less than 13 months, he would only receive two points, and it would be outside the 10-year period, so he wouldn't receive any points at all.

It appears that just about everything is against me. We have Mr. Griffis making the recommendation --

THE COURT: Well, why should today be any different, right?

MR. KACZOR: Well, and I guess really what I wanted to get to is I was going to say all I have on my side is common sense, but when I think about it, this situation really is different than just about everything else that's been addressed, and been addressed by Chief Judge Maloney, in that [24] the guidelines say -- and I understand this -- that you score not the time that someone served but the time that someone was sentenced to. We hear that all the time from our clients. You know, "I was served" -- "I was sentenced to 13 months, but I only served 11." Well, you get guidelines on 13 months.

Or in a state case, you know, "I got six months to two years." Well, you score it on two years. Because you don't score it on the six months, you score it on the two years. And that's what the guidelines say. You don't look at how much time you did, you don't look at how much time credit you got, you look at how much time you were sentenced to.

And so then we have the case that seems to be right

on point and that's the Ramirez-Perez case that was decided by Chief Judge Maloney. A little bit different because they are talking about a felony and a felony that qualified as an aggravated felony. And in that case they are adding up the 365 days and 234 days. And I guess my argument is what happens when in a state court someone gets six months to 20 years? Well, he's going to get three points for the 20 years, not for the six months. Well, what happens if he goes beyond the 20 years? And I just don't think that there's any -- I'm not sure of the word I want -- I can see it happening in federal court because we have the -- you're given a sentence, you're given, you know, a 40-month sentence, you get out, you're given [25] three years of supervised release, and if you continue to violate your supervised release, you can get up to another three years even if it's more than the original sentence. But there's no provision for that in the state court. And so when he first went to sentencing, he pled guilty to a 12-month misdemeanor. He couldn't have received any more than 12 months in the Kent County Jail. So it seems like in no time, regardless of whether he violates his probation or not, would he qualify for a three-point enhancement, because he can never get more than 12 months. And that's what makes it different than these other cases, because in each of these other cases the sentence that's aggravated doesn't exceed the maximum penalty. And that's what makes it different. That's what makes it real interesting to me. And, again, it's a common-sense argument. How can you get -- how can you get three points for a sentence that exceeds 12 months when the maximum is 12 months? And I understand you accumulate, but I think in everything that we've looked at, the guidelines, the cases, you know, the Galvin case, each of those deals

with a sentence that when accumulated was less than the maximum amount sentence. And that's the argument, Your Honor.

THE COURT: All right. Now, paragraph 48 has two separate convictions, though, right? I mean, well, what about, at least from a potential outside risk point of view, simply stacking those? You get 12 months on Count 1, you get [26] 12 months on Count 2, so you could have, you know, up to 24 months or two years. Certainly if we have multiple convictions here, we don't do it very often, but we could consecutively stack them. Why wouldn't that mean the court was within its rights in imposing and then having Mr. Quarles serve a period of time that exceeded the term of one of those convictions but not both combined?

MR. KACZOR: Well, and that's an interesting question too and something that I looked into. Because what was interesting to me was when you looked at the judgment, it never said one year on Count 1 and one year on Count 2 to run concurrent. It just said one year. And so all you can assume is that he was being sentenced in both and it was to run concurrent.

So the next question would be could it be consecutive? And I don't know that it could have been consecutive. There's only certain situations in the state court where you can run it consecutive. And if this is -- this is one particular case, two counts, probably that occurred at the same time, so it's not a question that he was on bond, released on bond, committed another offense. It's not an escape. I don't know that they could have run it consecutive, Your Honor. But I understand the argument, and that's why I wanted to look at the judgments.

THE COURT: Okay. Thank you.

[27] *MR. KACZOR*: You're welcome.

THE COURT: Let me hear what Mr. Lewis has to say on this issue.

MR. LEWIS: Your Honor, I think that Mr. Kaczor is correct that there simply is no support for his position. The guidelines address squarely how to deal with this situation. I don't think it's fair to assume they didn't foresee the situation of a period of time being imposed and then somebody serving less. They clearly did. And it happens all the time. So his argument is inconsistent with the guidelines, it's inconsistent with U.S. v. Ramirez-Perez, and he doesn't cite either today or in his briefing any authority whatsoever.

And I think I honed in on the same thing the Court did, is that his factual premise for his common-sense argument in terms of if he only could have gotten 12 months because that was the max just factually doesn't hold water here because as the Court points out, he in fact was convicted of two offenses. The defense says one was a 93-day misdemeanor and the other one was a year long. In any event, stacking up the time we're still within that window. So common sense doesn't support him, guidelines don't support him, Sixth Circuit case law doesn't support him, and we would ask that the objection be overruled.

THE COURT: All right. Well, the objection is to the scoring of paragraph 48 for three points. 48 lists a conviction on two state misdemeanors. It scored three points, [28] though, because there were probation violations and ultimately a sentence imposed by the Court that exceeded a year and a month or 13 months. Even though each of the underlying offenses of

conviction would have been a misdemeanor capping out at 12 months. And the question is: Do you have three points scored there or not? In the defense view it should never get worse than two points, and since the time limit then wouldn't be triggered, it would fall away altogether.

And from a guideline point of view in view of my Armed Career Criminal Act sentencing it no longer matters, but it's still worth addressing and resolving for the other reasons that Mr. Kaczor mentions. And because we don't know for sure what's going to happen with the Armed Career Criminal Act and the Court's ruling on that.

I am going to overrule this objection, though. I do think both legally and factually there are problems with it. Legally, as I think all people here concede, the defense really doesn't have authority to stand on, either from case law or from the guidelines. Certainly under the case law and the guidelines Mr. Griffis scored it properly based on the sentence actually imposed by the state court and then also the time actually served by Mr. Quarles on that.

The thing I would say is, well, what if the state got it wrong? What if Mr. Kaczor's intuition is correct that the state really didn't have the right to sentence in total more [29] than 12 months? And I think we would treat that issue the same way we would treat other attempts to collaterally attack otherwise final adjudications and we'd say we don't look behind the actual adjudication. Somebody would have to go back to the state court, get that vacated, if they could. But other than that, I'd charge and I think the guidelines require me to simply look at what the conviction actually showed. And when I just add those days up, whether

the state court was right or not, I think clearly the days add up to more than the 13 months and we'd have the premise for the score.

The last point is the more factual one that it seems to me when you have two offenses of conviction, each of them could be sentenced separately and stacked on the other one. There's actually a third related charge that was dismissed, I think, as part of this case. So, you know, how that all worked out as a practical matter I don't know. But I guess that's also further support for the idea that I shouldn't look behind the actual days on the judgment when I apply the guidelines. So for that reason I am going to overrule the objection and leave the 48 scored as it is.

Are there other objections from the defense to the guidelines or any other objection to the presentence report that we ought to take up at this point?

MR. KACZOR: No, there are none, Your Honor.

THE COURT: Okay. And in particular there was [30] at least at one point an objection to including paragraphs 19 to 23 and that's withdrawn as the I think sentencing memo indicated?

MR. KACZOR: That's correct, Your Honor.

THE COURT: Okay. And no objection to the four-point enhancement as well for the use of the firearm in connection with another felony?

MR. KACZOR: No, Your Honor.

THE COURT: Okay. And in that light, Mr. Lewis, is there an objection to the government on acceptance? Or since the four-point enhancement isn't objected to, is the government satisfied that in its view acceptance was properly credited here?

MR. LEWIS: Yes, Your Honor, we are satisfied and we do not object.

THE COURT: Okay.

MR. LEWIS: And if the Court is awarding acceptance, we would move for that third point.

THE COURT: I will go ahead and award the acceptance. I do think there's certainly portions of the presentence report that describe Mr. Quarles' description of the underlying offense of conviction in a way which if he's right would not warrant the four-point enhancement. Namely, that he used the firearm, pointed it at his companion in the car at the time, all of which was another felony which warranted four points. [31] His own description of the offense doesn't correspond with that in all respects, but by not objecting to the basis in the PSR that Mr. Griffis used for those four points, I do think all things considered acceptance of responsibility is still appropriate, so I'll grant those two. And with the third point that goes along with Mr. Lewis's motion, we go from a level of offense 34 where the Armed Career Criminal Act takes us in this case down to 31, criminal history category is VI either way, and the guideline range there is 188 to 235 months on a 15-year or 180-month mandatory minimum.

Any guideline objections from the government?

MR. LEWIS: No, Your Honor.

THE COURT: Or anything other than what we've already talked about, Mr. Kaczor?

MR. KACZOR: No, Your Honor.

THE COURT: Okay. Then let me hear from the parties on sentencing considerations generally. And, Mr. Kaczor, I'll invite you to begin.

MR. KACZOR: Thank you.

Your Honor, I know that you've read the sentencing memorandum. Probably more than once. Because I know how much time you spend and how much consideration you give to these cases. And we certainly appreciate it.

So I'm going to add just a little bit more knowing that you've read that.

[32] *THE COURT*: All right.

MR. KACZOR: Just a little bit more about Mr. Quarles. Let me tell you that he's an extremely intelligent individual. I mean, he's easy to get along with. I've represented him for what seems like a number of --

THE DEFENDANT: 18 months.

MR. KACZOR: 18 months. So we've met a number of times. And we've had a number of conversations. And I don't think we've ever had an angry word or he's never gotten really upset with me or said, "It's my way or the highway," which often happens. He's always been respectful of me and we've always had good conversations. He hasn't always agreed with me, but he's been extremely respectful.

It kind of surprises me, you know, when I read his criminal history and some of the things that have been attributable to him because he doesn't -- he doesn't seem like that kind of individual to me, Your Honor. And he accepts responsibility for this. He's indicated to me from the very beginning that he wanted to ste

up to the plate, so to speak, and accept responsibility. And I might have had some disagreement with the description of what happened, but he was willing to forego that argument. You know, he wants to be heard today. But other than what I put in there -- and in some ways it's not that different than what most of my clients go through in their life -- they certainly have a different [33] upbringing than I had, than I'm sure just about anyone in this court has had, but he has struggled. And, again, he's been respectful. Thank you.

THE COURT: Okay. Thank you, Mr. Kaczor. And thanks for the written materials as well.

Mr. Quarles, you certainly have the privilege to speak. You don't have to, but you may. I'll be happy to listen to you. I've read your letter as well, which I think I forwarded on to Mr. Kaczor.

THE DEFENDANT: I would like to scratch that too because I went in the law library trying to get my last little shot to Sean trying to fight, but I fight it from the civil book, it wasn't even right, so you can scratch that.

THE COURT: All right. Well, that's all right. You're simply talking about the timing of the motion there.

But go ahead. If you would like to use your opportunity to speak, I would be happy to listen.

THE DEFENDANT: Well, I want to start off by sayin' I know everybody in here you're all free so you all don't get the feelin' of a defendant, the feelin' a defendant might feel. But this is close to -- like I don't know how it feels to go to the death penalty, but it's an eerie feeling coming in here when you're a defendant, you know. And I'm not gonna lie, it really give me a funny feelin' comin' in here.

By you bein' so far up there and me bein' back here, [34] I get the sense of like I'm almost a baseball player and I'm throwing the ball at you and you're just windin' that bat up like "I'm about to knock you out the park." I know you all don't feel it because you're all not a defendant, but it's an eerie feeling.

But I don't want to deviate from why we're here, and it's a serious matter on my behalf. Judge Jonker, I know you see all types of defendants come in here out of all walks of life and everybody has a reason why they shouldn't get this much time or their upbringin' or a drug problem or I grew up in a crack house or such, et cetera, et cetera. But the thing with me is I do have some issues about when I came up and, you know, how I came up, but I do know right from wrong. And I know I wasn't supposed to have constructive possession of a firearm.

My hardest thing in my life is as far as really knowin' how to love. You know, I know right from wrong, I'm a good guy, I just never knew how to love right. So I hope in my road to redemption I probably can harness my little issues and come to terms and learn a little bit more about myself and seek help.

Other than that, I would just like to apologize. Like I told Sean before anybody came in here, I actually kind of thanked him. Because I actually became a man. You know, I'm not sayin' that the federal government they scared me, but [35] actually it's like, "Oh, you can spend the rest of your life, you will never get out of prison if you commit -- keep committin' crimes." And even though my crime is not a CSC or an armed robbery or a bank robbery, it's still a crime. I still broke the law. And, you know, I'm tryin' to right my wrongs, you know. I'm just tired of fallin' down and I'm tryin'

to right my wrongs. So I actually kind of thanked him. He kind of opened my eyes up a little bit.

So with that being said on the legal matter, as far as the relevant conduct, I just want to put this on record, I was kind of scared to object to it. I wanted to object to it, and I was willing to come in here and get higher than you was gonna give me because I didn't really do what was said in it. You know, I don't want to step on my own foot, but I was kind of scared because they came in and said, "If you object to this, you're going to get" such and such time. And I'm like -- so I was scared to object to a lot of other things that was in the PSI. So I just wanted to put that on record.

Dave did what he could, and I guess I've got to step up to the plate, Your Honor.

THE COURT: Okay. Thank you.

THE DEFENDANT: Yep.

THE COURT: Anything else at this point, Mr. Kaczor?

MR. KACZOR: No, Your Honor. Thank you.

THE COURT: Okay. You can both be seated and we'll [36] give Mr. Lewis a chance.

MR. LEWIS: Your Honor, we are asking for a within-guideline sentence in this case. We realize that's in excess of 15 years. But when one looks at the seriousness of this crime and the defendant's background, I think it is appropriate.

Here, four months to the day after he was released to parole, the defendant got into an altercation with his girlfriend, held her against her will, pointed a gun at her, and threatened to kill her. Two days before he had threatened an ex-girlfriend. These are -- and with

a gun. These are incredibly serious offenses. Especially because he was on parole for shooting at somebody back in 2008. Including the two incidents that occurred on August 22nd and 24th, that's his fifth firearm-related crime. He has a long violent history. Particularly against women. And based on the trajectory, it doesn't appear that absent a very serious sentence from this Court this pattern of conduct is going to end until somebody is dead.

We think that a sentence in excess of 15 years is necessary to protect the public, to deter the defendant and others.

Your Honor, I would note for the record that we did reach out to both of the women who were threatened in this case to see if they wanted to come, to submit a victim impact [37] statement. They did not want to do so and they are not here today, but I did want to put on the record that we did make those efforts. So with that I would leave the precise details of the defendant's sentence to the Court's discretion. Thank you.

THE COURT: All right. Thank you.

Anything else, Mr. Kaczor?

MR. KACZOR: No, Your Honor. Thank you.

THE COURT: All right. Well, again I want to thank the parties for the work they did on the legal issues in particular but also on presenting their respective views of the case and what's an appropriate sentence.

We have the guideline range based on the rulings that I've made. We then have all of the Section 3553 factors to consider, which include the need to punish appropriately, the need to deter this kind of conduct in Mr. Quarles and others, certainly the need to promote

rehabilitative opportunities as well. All of those things are in the mix. And that's where I want to go now.

We know we have a bottom end of 180 months and a guideline range of 188 to 235 months. What's the sentence that's sufficient but not greater than necessary to comply with the purposes of the sentencing statute?

I want to say, first of all, that, you know, for Mr. Quarles to present to his lawyer, Mr. Kaczor, in the way [38] that Mr. Kaczor describes doesn't surprise me because that's the way he's presented every time he's been in front of me. That's the way he presents in the written communications I get from him. An intelligent, respectful, pleasant, easy-to-get-along-with man. The kind of person that it would be a pleasure just in first meeting to get to know better. The problem is that's not the person who comes through in the history of contacts. Especially with women that have been an important part of his life. And that's really what lands Mr. Quarles here with the count of conviction. It's what triggered the Armed Career Criminal Act, because virtually all of his criminal history has roots in some struggle either with or over a female in his life. Most of them also have roots in drug- and alcohol-fueled activity, and most of them involve firearms. You know, that's a really troubling picture. And unfortunately it's a picture that I don't think Mr. Quarles himself has even fully taken in. He still, I think, wants to limit the picture of what he thinks happened. Perhaps because from my reading of the file a lot of the most egregious things that are happening out there happened when he was high on drugs or alcohol or both. He may not have a clear memory of what what's going on.

And if you had just one situation where there was variance between what Mr. Quarles might remember and what law enforcement and the offenses of conviction establish, that's [39] one thing. But when we have a litany from 2001, 2002, 2004, 2008, and now today, the pattern is pretty clear and unmistakable, and that's something that I think is very, very troubling and needs a punitive and a deterrent sanction. So in a way I'm surprised to hear one of the defense arguments that, "Look, please remember the purpose of the Armed Career Criminal Act, we really want to get to violent repeat offenders." I say, "That's true, but in my mind the pattern of conduct for Mr. Quarles, however it might break out on a technical Descamps parsing of the way particular crimes can be committed, as a matter of practical fact, he would be the paradigm picture for somebody, in my mind, that should fall within the Armed Career Criminal Act, because in many ways on multiple occasions he's demonstrated that there's a very dangerous mix for Mr. Quarles: Firearms, a former girlfriend, and drugs and alcohol."

I don't take pleasure in saying that, but it's the reality that I face and the one that is part of the presentence record that's been accepted now with only the objections that I've ruled on and none others. So we haven't had to take testimony from victims and the like. And when I look at that, I think the guideline range is entirely appropriate, even though it's still lengthy, and I do intend a sentence within the guideline range but somewhat higher than the low end to recognize these factors.

And the intended custodial sentence of the Court is [40] 204 months, which is still within the guideline range, neither high nor low, and not as high as the

next level up, but I think an important statement that this kind of behavior has serious consequences, that the public is in need of significant protection, and that Mr. Quarles has to internalize the seriousness of what's been happening in his life.

Just to quickly summarize, I won't say everything, I think the presentence report is clear and I think the government's sentencing memorandum is also quite pointed on these things. Let's start with the offense of conviction. It may be that Mr. Quarles in his heart of hearts still doesn't like the way that the PSR describes it, but the reality is nobody has objected, so we didn't go through the exercise of bringing in witnesses to say what actually happened, but the description in the PSR that now stands demonstrates again an alcohol- and drug-fueled problem, a firearm, and a former girlfriend or maybe even a current girlfriend in Ms. Warren who had a gun pulled on her and threats made directly to her face like "Do you want to go to a wedding or a funeral?"

The description of what happened, multiple law enforcement contacts, locking herself in a bathroom at a gas station initially, this is the kind of danger and risk to not just Ms. Warren but other people in that community that is very egregious and in need of appropriate response.

More than that, two days before, on August 22 instead [41] of August 24, we have a very similar description of the same kind of activity involving a different woman, Ms. Moore. That's bad enough, but these things happened while Mr. Quarles was on probation for shooting at somebody in Saginaw, Michigan, in 2008. He had been released in April of 2013 on parole and then had these incidents just four months later.

The shooting in Saginaw didn't involve directly a woman but was over a woman, Ms. Turner. Ms. Turner was the person he first had serious law enforcement problems with in 2001.

And then he had another home invasion with Ms. Seymore, I think that was 2002, and Ms. Cruzado in 2004. Each of these serious violence or threats of violence perpetrated against the women involved had progressive consequences moving all the way to the most severe in 2008, but then, as I said, four months after he's on parole we have the repeat incidents.

I just can't ignore that. And I think for those reasons something within guidelines, which are still very long, but a little bit above the low end is appropriate, and that's the reasons for it.

I'm certainly going to recommend to the Bureau of Prisons that Mr. Quarles receive substance abuse assessment and treatment. In my mind it's shocking that he hasn't received that before, but that's what the PSR says. I know that's partly because he doesn't think he has a problem. I would say [42] only, you know, read the reports of the criminal activity, and if every time you're running into those kinds of violence encounters there's substance abuse involved, I think you have a problem, and I think one of the things you need to do, Mr. Quarles, is get a handle on it.

I'm also going to recommend mental health assessment and treatment so that you can work on and come to grips with the repeated violent interaction patterns that you've had with the women in your life. That's not good for you, it's not good for them, and it's not good for the communities in which you live.

In terms of supervised release, I do intend the five years, which I think is the minimum in the Armed Career Criminal Act context, and I think an appropriate length anyway to manage reentry.

The normal mandatory conditions including cooperation in the collection of DNA, drug testing, and a ban on firearms or other weapons. Standard conditions including no alcohol. And standard conditions that -- or special conditions rather that Mr. Quarles participate in a program of testing and treatment for substance abuse as directed by the probation officer until released, paying a portion of the costs as he's determined able; (2) that he participate in a program of mental health treatment as directed by the probation officer until released, paying a portion of the costs as he's determined [43] able. And that could include what we now call MRT in this district, which is a program designed to assist in helping people restructure the way they make decisions and hopefully be better at choosing to comply with the law. (3) that he provide the probation officer with access to requested financial information. And (4) that he maintain legitimate full-time employment approved by the probation officer.

In terms of a fine, there's not in my view an ability to pay a fine within the guideline range. There's really no significant history of work and there's no asset base. There is ability to work in the prison setting and hopefully when he's out, so I'm going to go below guidelines and intend a fine of $2,500 on the normal custodial terms which are $25 minimum quarterly installments under the Inmate Financial Responsibility Program or minimum monthly installments of $20 otherwise and then the balance due in supervision in minimum monthly installments of $25.

The forfeiture in this case if it hasn't already occurred administratively would also be a part of the Court's judgment, the 45-caliber semiautomatic. And the special assessment is $100. So that's the intended sentence of the Court.

For the government, legal objections?

MR. LEWIS: No objections. Thank you, Your Honor.

THE COURT: And, Mr. Kaczor, other than the [44] objections that are of record, others you want to make at this point?

MR. KACZOR: No new objections, Your Honor. Thank you.

THE COURT: All right. I'm going to go ahead and impose that as the sentence of the Court, then, which is 204 months of custody followed by supervised release of five years, a fine of $2,500, forfeiture of the 45-caliber semiautomatic, and a special assessment of $100.

And I'll make that the sentence and judgment of the Court now, Mr. Quarles. I'm going to make it the written judgment too, and then you've got that appeal window. Fourteen days. You have probably already talked to Mr. Kaczor and Ms. Tosic about it, but do that again, get your appeal on file within 14 days, and then you can raise all the issues that you've preserved here.

Any questions about that?

THE DEFENDANT: Um, I just -- do you determine if I get my time credited from where I've been? Because I know they have got me marked down for March 4th, but I've been on the same case since August 24th.

THE COURT: The people who resolve that normally are the Bureau of Prisons, and they look at their grid and whether that time has been credited anywhere else. And if it hasn't, then normally the time that you've been in marshal custody [45] would be credited against the sentence. But that's a Bureau of Prisons decision in the ordinary case.

THE DEFENDANT: Okay.

THE COURT: Anything else?

THE DEFENDANT: No. You told me I was gonna lose. You did tell me that.

THE COURT: Well, I remember the plea, and I at least told you you had to be prepared to lose if you wanted to go ahead with the plea.

THE DEFENDANT: You told me I had a bad hand. I won't lie about that.

THE COURT: That's probably true. I probably did say that. You know, the issue will continue to come along. And you have capable counsel that have helped you.

And, you know, I wish, Mr. Quarles, that you can get to the point, I hope you do, where the women in your life experience you the same way as Mr. Kaczor and I do and the way that you interact here and with them. You clearly have intelligence. You clearly have the capability to be respectful, engaging. And unfortunately that hasn't been your pattern with the people --

THE DEFENDANT: Right.

THE COURT: -- that I've talked about. And believe me, they would rather have that, and I'm sure you would too. And the community needs that.

[46] *THE DEFENDANT*: Well, I thank you, Judge Jonker. One more thing I want to say is that, you know, no hard feelin's against nobody, you know. And I don't want to sound like I'm usin' a crutch from my mother, but I just wish she would have taught me -- I never knew how to love. I was never shown no love. So I think with the women, I don't want to seem like I come off as being disrespectful towards women, but I think if she would have shown me to love, I never was taught how to love. So when I feel like I'm gonna lose somebody that I love, you know, that's some issues that I have to deal with. And that's been since I was a kid. My mother never really loved me. So, you know, that's some issues that I was tellin' you about I'll have to deal with on my road to redemption. So it's no hard feelin's. I appreciate it.

THE COURT: Well, we hope for your road to redemption. That would be the outcome we would all like to see.

THE DEFENDANT: Well, hopefully I'll see you this summer, so . . .

THE COURT: Okay.

THE DEFENDANT: Thank you.

THE COURT: Anything else today from the defense?

MR. KACZOR: No, Your Honor. Thank you.

THE COURT: Government?

MR. LEWIS: No, Your Honor. Thank you.

[47] *THE COURT*: Thank you.

THE CLERK: All rise, please. Court is in recess. (Proceeding concluded at 12:19 p.m.)

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Date: March 5, 2015

/s/ Glenda Trexler
Glenda Trexler, CSR-1436, RPR, CRR

APPENDIX H

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 16a0158n.06

No. 15-1161

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	ON APPEAL
	)	FROM THE
Plaintiff-Appellee,	)	UNITED
	)	STATES
v.	)	DISTRICT
	)	COURT FOR
JAMAR ALONZO QUARLES,	)	THE
	)	WESTERN
Defendant-Appellant.	)	DISTRICT OF
	)	MICHIGAN
	)	

BEFORE: BOGGS, SILER, and BATCHELDER, Circuit Judges.

PER CURIAM. Jamar Alonzo Quarles, a federal prisoner, appeals a sentence of 204 months of imprisonment imposed following the entry of his guilty plea to a charge of being a felon in possession of a firearm.

Quarles raises two issues on appeal: 1) whether he qualifies as an armed career criminal within the meaning of the Armed Career Criminal Act, and 2) whether his criminal-history score was correctly calculated with respect to two prior misdemeanors that the

district court assigned three criminal-history points pursuant to USSG §4A1.1(a).

The district court determined that Quarles was an armed career criminal under 18 U.S.C. § 924(e) based in part on a prior Michigan conviction for third-degree home invasion, *see* Mich. Comp. Laws § 750.110a(4)(a), which the district court found was a violent felony under what is known as the residual clause of 18 U.S.C. § 924(e). See 18 U.S.C. § 924(e)(2)(B)(ii) (defining "violent felony" as a crime that "involves conduct that presents a serious potential risk of physical injury to another"). The Supreme Court recently held that the residual clause is unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015). However, the government argues that the crime of Quarles's prior conviction is a "generic" form of burglary and that we may thus affirm the district court's determination that Quarles is an armed career criminal. *See Descamps v. United States*, 133 S. Ct. 2276, 2281–86 (2013) (delineating the contours of "generic" burglary and clarifying the application of the "formal categorical" and "modified categorical" approaches). Upon consideration, we conclude that this issue is best determined in the first instance by the sentencing court.

We do not reach Quarles's argument regarding the district court's calculation of his criminal-history score because resolution of that issue will become necessary only if the court determines that Quarles is not an armed career criminal. If Quarles is determined to be an armed career criminal, his criminal-history score will be VI irrespective of whether the district court correctly awarded three points for the two prior misdemeanors at issue. Accordingly, the district court's judgment is **VACATED** and this matter is **REMANDED**

to the district court for resentencing.

APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	
	Docket No.: 1:14-cr-29
v.	
JAMAR ALONZO QUARLES, Defendant.	

TRANSCRIPT OF RESENTENCING HEARING
BEFORE THE HONORABLE ROBERT J. JONKER
UNITED STATES DISTRICT JUDGE
GRAND RAPIDS, MICHIGAN
May 16, 2016

Court Reporter: Glenda Trexler
Official Court Reporter
United States District Court 685
Federal Building
110 Michigan Street, N.W.
Grand Rapids, Michigan 49503

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Grand Rapids, Michigan
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2:04 p.m.

P R O C E E D I N G S

THE COURT: All right. We're here on the case of the United States against Jamar Quarles, 1:14-cr-29. The time set for resentencing following remand. And let me start with appearances, please.

MR. LEWIS: Good afternoon, Your Honor, Sean Lewis appearing on behalf of the United States. I'm joined at counsel table by Task Force Officer Matthew Kubiak.

THE COURT: All right. Thank you.

MS. TOSIC: Good afternoon, Your Honor, Jasna Tosic [3] from the Federal Defenders Office, and seated at counsel table is Mr. Jamar Quarles.

THE COURT: All right. Thank you.

So let me summarize what I have. Of course I have the original file intact. That didn't change. We have the Court of Appeals remand order, which was, as I read it, pretty a flat remand after Johnson saying do this again in light of Johnson. Then I have sentencing memoranda from each of the parties. So one from Mr. Lewis and one from Ms. Tosic. And then I also got from the Defenders' Office a filing of some Certificates of Achievement on behalf of Mr. Quarles. I think that's it.

Should I have anything else in writing from the government?

MR. LEWIS: I'm not aware of anything else, Your Honor.

THE COURT: Or the defense?

MS. TOSIC: No, Your Honor. That's all.

THE COURT: So the big issue, I think -- well, let me start out with the plea agreement because there wasn't one, so we can pass by that.

In terms of the guidelines, with respect to including the information in paragraphs 19 to 23, I'll just incorporate the ruling I did at the original sentencing.

The big issue is certainly how the career-offender [4] enhancement applies now in light of Johnson. We know the residual clause is out, but the question is: Does the Michigan home invasion third degree still qualify under either the categorical or modified

categorical as the equivalent of generic burglary? And the parties have focused on that.

So let me hear the parties' positions, make sure I understand it, and then we'll go from there. Certainly the ruling on that strikes me as the big one. If I go with the government's position, we'll still go ahead and rule on the other objection, which is to the criminal history scoring, though it won't materially affect that. On the other hand, if I go with the defense, that issue will be in play, so we'll deal with it then. But I would like to start with career offender.

Are there any other guideline objections beyond the career offender and the criminal history scoring on those three points?

MR. LEWIS: Not from the government.

MS. TOSIC: No, Your Honor.

THE COURT: All right. So why don't we go ahead and, Ms. Tosic, I'll start with you since you're objecting to the probation officer's position, and then we'll go to the government after that and give you some rebuttal.

MS. TOSIC: Thank you, Your Honor.

Well, as the Court said, the issue here is whether [5] home invasion third degree under Michigan law is a generic burglary. We briefed this issue twice in the court, so I'll just be brief and focus on the main points.

THE COURT: All right.

MS. TOSIC: Our argument that home invasion third degree is not a generic burglary because it is broader than generic burglary for two reasons.

The first reason is that the Supreme Court and the Sixth Circuit made clear that an offense is a burglary

only if it involves entering a building or a structure. And the offense is not a generic burglary if it involves entry into places like tents, boats, vehicles, motor trucks, motor truck trailers, and similar places.

So what we have in this statute is that home invasion third degree involves breaking into a dwelling, and "dwelling" is defined in a separate statute -- actually a separate subsection of the statute -- as a "Structure or shelter that is used permanently or temporarily as a place of abode, including appurtenant structure attached to that structure or shelter."

So a "shelter" that is part of the dwelling can include structures that are not buildings. Can include tents. It can be a motor vehicle. It can be other similar places that the Supreme Court specifically excluded from the definition of burglary. And, therefore, the statute is broader than generic burglary.

[6] The issue previously came up whether some previous Sixth Circuit cases, Gibson, Horton, are controlling because they previously held that home invasion second degree is -- the argument is that these cases are not controlling in light of subsequent decision in Descamps, which focuses -- which requires that courts focus more rigorously on all the different ways that the offense can be committed. And in these cases the court didn't really look at what is a definition of dwelling. It did not consider that it can involve -- include other places. And, therefore, these decisions are not controlling.

I think instead the Court should look to United States versus Prater which held that post Descamps that New York third-degree burglary is not generic

burglary because it involves entering into places other than a building. So that's the argument number 1.

THE COURT: All right.

MS. TOSIC: The issue then becomes in context of that argument whether the Court can look to Shepard documents. We had previously argued that this statute is divisible, and I think that that is still a controlling law in this district under United States versus Prater because Prater involves a substantially similar statute that prohibited entering into a building and then defined a building in a separate statute to include buildings and nonbuildings. So that is still controlling law and I would say probably one that governs these [7] proceedings today.

However, in light of this new case, Mathis versus United States, we wish to preserve the argument that this actually should not be considered a divisible statute. And the issue in Mathis is basically elements versus means. It involves a substantially similar statute to the one that we have here. The statute there prohibits entry into an occupied dwelling, occupied structure, which is defined in a different part of the statute or different statute as encompassing some nonbuildings. And the argument that's made is that the element of the offense is occupied structure. So that's the element that the state has to prove -- charge in the document and prove or defendant has to admit to it.

And that separate section which defines is just illustration and it's basically the means that it can be. And the argument that's made there is that because the Court may not apply modified categorical approach. So we are preserving that argument.

If the Court looks at the Shepard documents, they do not establish that Mr. Quarles broke into a building because the charging document said that he broke into a dwelling that is located at Stonebrook Court.

"Dwelling" is really a term of art, and what is identified here is a specific address, specific parcel of land, but the actual place that was broken into still could be a [8] tent, could be a vehicle, could be a boat, so, therefore, the Shepard documents don't establish that breaking was done into a building.

And then I would move to my second argument, the second reason why this offense is not generic burglary. Unless the Court --

THE COURT: What do you do with the other Shepard document, the transcript of the plea? Which you can so contest, and the court is saying there that Mr. Quarles broke into a screen window and assaulted her while in the house. Even if your other arguments are right, doesn't that necessarily mean the factual basis here involves a structure?

MS. TOSIC: Right.

THE COURT: So how -- I realize you're preserving your Mathis argument, but put Mathis to the side, why isn't the Shepard document as a whole, even if I accept your argument that dwelling alone isn't enough, don't we have a factual basis recited that involves going through a screen window in a house?

MS. TOSIC: As far as screen window goes, two arguments about that. First, the Court may consider the transcript or the colloquy at the plea if the defendant assented to it, if he admitted it. And in this case he did not admit to it. The court stated that he pushed the screen window in, but Mr. Quarles did not admit that.

The court did not ask him whether that's true, so he did not necessarily admit that.

[9] *THE COURT*: Then you don't think his no contest essentially admits the factual basis that the court recited at that point?

MS. TOSIC: The court recited that, but Mr. Quarles did not assent it.

THE COURT: Yeah, but I'm saying you don't think he assented by saying no contest?

MS. TOSIC: No.

THE COURT: That's what happened. So what do you do with that? The no contest is just to the language of the Felony Information in your view and everything beyond that is off limits for Shepard's?

MS. TOSIC: Yes, Your Honor.

THE COURT: Okay. All right.

MS. TOSIC: And even if he assented, like pushing the screen window in, a tent can have a screen window, a boat can have a screen window.

THE COURT: Right, but it says screen window and assaulted her while in the house. So if you have a screen window in a house, it sounds like a structure. But I understand your position that I can't use that. Right?

Okay. So go ahead to your other argument.

MS. TOSIC: I'm sorry, Your Honor?

THE COURT: So you can proceed to your other argument.

[10] *MS. TOSIC*: To the second argument?

THE COURT: Right.

MS. TOSIC: The second argument is that Michigan offense of home invasion third is not categorically generic burglary because it includes entry or remaining in without intent to commit a crime.

The Supreme Court said that a prior conviction qualifies if the statute elements are same or narrower than generic offense. And the Supreme Court stated that definition of generic burglary requires all of the following elements: An unlawful or unprivileged entry into or remaining in, number 2, building or structure, and number 3, which is important here, with intent to commit a crime.

So the issue becomes whether this intent has to be contemporaneous, has to be present at the time of entry or at the time of the decision to remain in. And the Sixth Circuit did not -- and why that is important is that one of the ways to commit this offense is if the person -- while there are several ways to commit, and some of these do say based on enter with intent, one of the ways to commit offense is to break and enter the dwelling or enter the dwelling without permission and at any time while he or she is entering, present, or exiting the dwelling commits the misdemeanor.

So when we look at this, there is no contemporaneous intent. And as I said, Sixth Circuit did not address that [11] issue, but several other courts did.

And the Fifth and the Ninth Circuit held in a statute that was substantially similar to the statute involved here where there was an entry without a contemporaneous intent and defendant later on commits a crime, these courts stressed that Model Penal Code, Black's Law Dictionary require contemporaneous intent, and they held that these offenses are not generic

burglary, even though the defendant committed offense later because there was no contemporaneous intent.

Fourth Circuit went the other way and held that even if there was no intent at the time of the entry or remaining therein, defendant committed a crime, so he necessarily developed the intent to commit a crime while in the building. But dissent is along the line of the Fifth and Ninth Circuit stating that contemporaneous intent is the essence of burglary at common law. And that Taylor, Supreme Court Taylor definition states that burglary definition approximates the Model Penal Code which does require contemporaneous. And dissent concluded the crime must -- that defendant's intent to commit a crime must exist contemporaneously with unlawful entry or unlawful remaining.

And because this element is missing, this offense is not categorically a crime of violence. Which then again brings us to a modified categorical approach, and the charging document does not establish that there was a contemporaneous [12] intent.

THE COURT: Okay. Thank you.

Let's hear what Mr. Lewis's position is, and we'll see if there's any rebuttal after that.

MR. LEWIS: Thank you, Your Honor. We too have briefed this extensively, and I attached to my sentencing memo the brief that I filed with the Sixth Circuit where I laid out -- and I'll just very briefly hit the high points today -- that I believe that the PSR, the presentence report, got the guidelines right for three independent reasons. And I would ask the Court to rule on each of these bases today.

I think there are three independently -- independent and sufficient reasons to impose a sentence under the ACCA today.

First, we maintain our position that there is controlling case law in the form of Gibbs and Horton. The Sixth Circuit case law is what it is. Perhaps if the Court were writing on a clean slate, it would engage in a more rigorous analysis. But I was just looking at Horton before the Court came in here today, and the Court actually does lay out in significant detail the statute and look at the different iterations and ways in which the Michigan burglary or home invasion statute can be violated. So it's not accurate, I think, that the court -- the Sixth Circuit simply has given short shrift to the analysis over the years. So that's the [13] first independently sufficient reason to impose a sentence under the ACCA.

The second is, even if the Court says, "Well, all that was before Descamps, so I'm going to go ahead and look in a very detailed fashion at the statute," I went through and did that in my brief the four different ways that the statute can be violated, and each of them is the same as or narrower than generic burglary. And I think what we're really talking about here is the third and fourth possibilities where the Michigan statute is narrower because it requires the actual commission of an offense and not just intent. And then -- so that's the second reason.

The third independently sufficient reason is if we get past Gibbs and Horton, if we get past the categorical analysis, and if the Court says, "Well, this statute is divisible," I can then go ahead and look at the Shepard documents. Here the Shepard documents do establish that the place was a building or other structure

within the meaning of Taylor. I cited a good number of cases in my briefing from the Fifth Circuit and the Ninth Circuit, which certainly tends not to be government-oriented, but there are a number of decisions affirming convictions, holding that the Shepard documents are sufficient on records analogous to what we have here.

And the Court also has the defendant's concessions here in court about pushing in the screen, which is further [14] evidence that the Court can use. The Court doesn't even need to go there, but I think the Court is, under the case law, entitled to rely on those in-court concessions about the defendant pushing in a screen.

And then, again, in that third category there is with regard to the offense that was charged in this case a requirement of specific intent. And I laid that out again in my briefing. The defendant was charged with either committing an assault or intending to commit an assault while in the building. And those are specific-intent crimes under Michigan law. Those are elements. They are not means. So whichever of these three avenues we take, all of them lead us to the same conclusion that the defendant does have a qualifying conviction, that it is the equivalent of generic burglary, and the Court should, therefore, impose a sentence under the ACCA. Now I'll just say a couple words about the defense argument. I think the biggest impediment to their place argument is all they have given the Court is hypotheticals. They haven't cited a single case where the statute has been used to prosecute someone for invading a tent or anything else. And under the Supreme Court case of Gonzalez, which was in 2007, that is fatal to their argument. They simply theorize, as any lawyer would do, that, well, maybe this could be

stretched. But legal imagination I think is the words the Supreme Court used, it just isn't enough.

[15] And the statutory framework, the argument that we listened to today, would work if the defendant were convicted under 750.110, which does include a litany like tents and a variety of other areas that fall outside of the definition of generic burglary, but that's not the statute that we're dealing with today.

Their argument about the intent, I'm not entirely sure whether they are adhering to their initial argument, which was that intent at entry was required. Their briefing seems to bounce back and forth on that. I'm not entirely sure where they are at. But the recent Sixth Circuit case of Priddy addressed a very similar statute and held that remaining and committing a crime while remaining, I believe it was unlawfully in a building, is the equivalent of generic burglary.

So in addition to the other arguments in my briefing, I think Priddy raises an impediment that they haven't addressed much less can get around.

So unless the Court has questions about that, I would rest on the briefing. I guess I would note when the Court was asking defense counsel about the plea transcript for the underlying conviction, I think -- unfortunately I think defense counsel is right that there isn't much we can do with the uncontested fact that this was in fact a burglary of a building because it says so in the plea transcript. I think that defense had previously in this case cited the case of McMurray [16] in the Sixth Circuit. That was an Alford plea situation. Unfortunately, I think counsel is right about that. But I don't think that we need to rely on that transcript. There is, if we are in that third category, more than

ample information in the Shepard documents to justify a sentence under the ACCA.

THE COURT: All right. So you're saying the Michigan statute 750.110 explicitly covers things like boats or tents?

MR. LEWIS: Yes.

THE COURT: And that that ought to be a part of the Court's construction of what dwelling means in 750.110a?

MR. LEWIS: Yes.

THE COURT: When I have to interpret what a structure or shelter means in that context, I can use the 750.110 to suggest, at least in Michigan, you couldn't define, in your view, shelter to include the boat or tent in part because Michigan has a different section that covers that kind of thing?

MR. LEWIS: In part, yes, that is certainly true. We've got Gonzalez in the first instance, the absence. And I looked and couldn't find any instance where this statute, 750.110a, have been used outside of what we traditionally think about as generic burglary. Of course take that for what it's worth.

But with Gonzalez, with the defense inability to offer anything other than hypotheticals and the statutory [17] structure showing that where the legislature intended to encompass things like tents, they certainly knew how to do so, they didn't do so in 750.110a.

THE COURT: Okay. I think that's all for now.

Any rebuttal from the defense?

MS. TOSIC: Just one quick comment about the last question that the Court -- the argument that a separate statute covers boats and tents.

Statutes can be overlapping in some sense. And just because a separate statute covers boat and tent does not mean that a home invasion third degree can also not include that. And it is also -- 750.110a is different from that in that this shelter has to be used permanently or temporarily as a place of abode, so that adds the element to it.

So in one sense they are overlapping, but in other sense they are different. So just because this other section includes this particular place does not mean they are excluded from 750.110a.

THE COURT: Okay. Thank you.

All right. The issue now that the residual clause is out is whether or not the home invasion third under 750. -- that is MCLA 750.110a is nonetheless a crime of violence because it's the functional equivalent of generic burglary. That's what's on the table today. And as both counsel have indicated, they briefed it thoroughly. I appreciate that. [18] About the only thing I'm sure about today is that this issue isn't going to be settled here and that whoever wins needs to take it up and get it resolved in the Sixth Circuit, because I think that there's room to argue both directions here. I don't think it's as clean and clear an issue as either side presents in the briefing.

So let me start with the government's first argument, which is that you've got controlling case law in this circuit in Horton and Gibbs, and that that ought to settle the matter.

You sure would think so on the face of things because you've got the unpublished decision on home invasion third and then you've got a published decision on home invasion second treating it as a generic functional equivalent of burglary, and yet both of those decisions do predate Descamps, and I think that's significant, particularly when I look at what the Circuit itself did in Prater. Not a Michigan statute to be sure, a New York penal code statute, but nonetheless a similar analysis, a similar opportunity to parse the different ways in which a crime can be committed. And I think even though there's not an explicit reference in any way that overrules Gibbs or overrules Horton, that it's at least prudent to say in light of Descamps I've got to look a little closer. And I think that's the fundamental message that I get out of the Supreme Court in Descamps and out of the circuit itself in Prater.

[19] So on the first argument for the government, although I acknowledge the case law is there and I may swing back to that when we get to the intent issue later, I don't think it closes the door to what the defense is arguing here. I think it's a better approach to move on and press under the next approach as what do we have here in this statute?

The real issue, certainly, in the first argument that the defense is making is that, look, 750.110a requires breaking and entering a dwelling, but "dwelling" is a defined term and you have to look at what those definitions or that definition includes. And it includes "A structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter." That's the quote from the statute.

I'll talk about that in a minute, but before I do that, I understand the defense is preserving what it called its Mathis argument. And, of course, you can do that, but I'm certainly not accepting the Mathis argument. It seems to me the other message of Prater, the one that maybe isn't so good for the government but the one that I don't think is good for the defense, is that it shouldn't matter whether the statute separately lists out all of those things or simply uses the term "dwelling" and then defines it someplace else, that that's in part what the whole effort is under Descamps and Taylor to get at generic burglary. To get beyond the labels, to get [20] beyond the way a given state defines particular crimes and say, whether it's in a definitional section or whether it's in a string, a list, you ought to get to the same result. So I understand their argument is preserved, but it's not a persuasive one to me.

When I look at what 750.110a means by "dwelling," let's look at the definition, if that's all I'm looking at, I understand the defense position that when you have "structure" or "shelter" that "shelter" is a potentially broader term that could in some situations include things like a tent or a boat. And we know from Taylor that that's not good enough. Tents or boats aren't going to fit within generic burglary. So that's potentially a problem for the government.

The thing, though, that I think is different about the Michigan statute is that a dwelling isn't in isolation. We have other sections of the Michigan code, including 750.110, that talks about other unlawful entries into structures or things, specifically including a tent, a boat, ship, shipping container, a whole series of other things. Railroad cars. And when I look at it against that, when I'm seeing what the Michigan

legislature is defining as criminal ways to break and enter or home invasion, everything about the way Michigan defines 750.110a suggests to me a desire to be more limiting, to focus on dwelling, on the place of abode that's permanent or temporary. And it seems to me against that, the best argument, [21] the one I'm accepting anyway, is the one from the government that the dwelling has to be something that is fundamentally structural other than a boat or a tent. It seems to me in this particular unique situation Michigan is different than the New York statute in Prater, and perhaps that's what the judge had in mind in the Eastern District in Fields, he didn't articulate it that way, but the net result of Fields is to say that the Michigan home invasion sequence is in fact a categorical crime of violence apart from the residual clause. So I think that makes sense, and I'm going with the government position on that.

But that also informs the Shepard's documents inquiry, it seems to me, if we get to that level, because we're talking about not just a dwelling, which is asserted in the Felony Information, but a dwelling with a specific street address. I think when you couple that with the admission in this case that the screen was pushed in, we have all of the elements that would create a structural entry, one that would fall within the Taylor definition of generic burglary, and so I think that even without any reference or reliance on what the judge in the state case articulated as factual basis, we would be there on the Shepard documents in any event on the dwelling. So that would be on the main first argument that the defense makes.

The other argument is, "Well, generic burglary also [22] requires some intent that's either

contemporaneous with the entry, intent to commit a crime, or an intent that's formed while remaining unlawfully on the property. And at times I was a little confused too with whether the defense was saying it has to be there as you're walking in the door, or through a window in this case, but in any event, this is an argument that I don't think works for the defense.

In my mind the way the Michigan law defines the necessary intent, particularly with what we have here which is a specific-intent state crime, state misdemeanor, no matter which version of the intent element you're proceeding under, 750.110a, whichever, you're either having the intent at the time of entry through the screen or while still remaining in an unprivileged access in the house or in the structure. So either way on this case when we get to the Shepard document inquiry, it seems to me in the admission that the defense made here in this case we are where we need to be for generic burglary, and I do think the Priddy decision from the Sixth Circuit recently, albeit in a somewhat different context involving a Tennessee statute, essentially reaches the same result. I don't see how you could have a specific-intent crime committed while residing or remaining in an unprivileged entry status and not satisfy what Taylor describes as the generic burglary.

The one issue that nobody is raising, and I probably [23] shouldn't raise it myself, but in light of Friday's decision from the Sixth Circuit on Johnson's applicability or the vagueness applicability to the career offender language of the guidelines as well as the ACCA itself, I have to say, you know, this whole enterprise that we've just spent 35 minutes on as two counsel and

the Court, that both of you have spent a lot of time briefing and the cases going in many different directions, it would sure seem to me that a reasonable argument could be made that trying to functionally equate a state statute with some concept of generic burglary is probably just as vague as some of the other things that courts, whether the Supreme Court in Johnson or the Sixth Circuit in Pawlak on Friday, have found to be unconstitutionally vague. It's a very fresh issue, nobody has briefed it, I'm not relying it, but it's something that I hope the circuit addresses when they get this issue once again.

So I'm going to go ahead and overrule the defense objection on the crime of violence, finding that Michigan home invasion third degree does qualify as the functional equivalent of generic burglary for the reasons outlined. And what that means is that the guidelines go to 34 as level of offense, and criminal history VI regardless of any other issue on criminal history. I would, once again, find acceptance of responsibility appropriate. And I assume that the government is still moving for the third point?

[24] *MR. LEWIS*: Yes, Your Honor.

THE COURT: Okay. So we're down to 31 by granting that motion, criminal history VI, and 188 to 235 months as the guideline range.

Let me just say provisionally on the criminal history issue that the defense raised and briefed, and the government briefed as well, I'm going to incorporate what I did before. It seems to me the only way to read the text of the guidelines and the application note is to say you add the original time that the Court imposed plus whatever additional time the Court imposed on

the two revocations. And when you do that, you add up to 480 days, which puts you beyond the 13 months, and it seems to me it's properly counted by the presentence officer at that point as a three-point score. It doesn't matter to the outcome if in fact the ruling on the career offender is correct. But if it isn't, I would find that the three points were correctly scored for that reason.

So let me hear from the parties on sentencing issues, allocution and the like, and we'll start with Ms. Tosic.

MS. TOSIC: So does the Court want to hear allocution?

THE COURT: Anything else that the parties have in mind for sentencing. Allocution, arguments on any other sentencing issue, or variance, or whatever. Whatever your package would be at this point for sentencing.

[25] *MS. TOSIC*: Well, I want to highlight that Mr. Quarles since he has been incarcerated in the Bureau of Prisons has done really well. I have submitted a letter from a warden, Mr. Strunk, in which he said that Mr. Quarles maintained good conduct. That he had a good work report. He was working in a gym, cleaning up the gym, and he received all good work reports.

He took to heart what the Court told him last time he was here, so he enrolled in drug education program, and the certificate is submitted to the Court. He completed some vocational training. He was in a one-year wiring program and was very proud to tell me that now he can wire any house. So basically he now has a trade that he can rely on when he gets out of prison.

He also enrolled in a class called Thinking for Change, which is another drug-addiction program

which is a year long, and he committed -- completed three and a half months of that.

He also enrolled in a beading class, and that is a class --

THE COURT: In a what class?

MS. TOSIC: Beading class.

THE COURT: Oh, beading class. What is that?

MS. TOSIC: That is a class that teaches people how to make jewelry from beads. And the reason he said he enrolled [26] in that class is to have some positive activity. That he's doing something positive. And also it's a skill that he can perhaps use later on.

He is planning to take a so-called RDAP class, which is a drug education program, and he already had an interview to be placed in that program and is on a waiting list for yet another drug program.

He's planning to take culinary program and is on a waiting list for that too, because he loves to cook and it would give him another skill. Something that he can do and get a job when he gets out.

And then he's on a waiting list also for a leather class where he would learn how to make belts and how to make purses, which is, again, another skill that he can use.

Also I think it is significant that what he said, his family did not give up on him. He has support of his family still. His mother, his grandmother, his children. He keeps in contact with phone calls, with emails. His mother visited him in the prison. And this is going to be important for him to have these people be there for him when he gets out and kind of see him through all these years that he's going to be away.

And just one -- my personal observation. I've had many contacts with Mr. Quarles. He called me quite often. He was always very respectful of me and expressed his appreciation and was always very grateful for all -- all the work that I [27] have done for him. Thank you.

THE COURT: All right. Thank you.

Mr. Quarles, you certainly have the privilege of speaking, and I would be happy to listen to you if you would like to address anything to me right now.

THE DEFENDANT: Your Honor, I just want to say that I'm clearly not the man that stood in front of you a year ago. I don't want to use this analogy, but I will. It's like to me a person has like two wolves inside of them, and you have one that's probably -- they are fighting each other. One is prosperity, trust, dependable. And then you have another one that's probably envious, negativity, violence. And to me the person that wins that battle is the one you feed. And I've come to be a man of action. And I'm living life through the eyes of a righteous man now.

To me being locked up at U.S.P. McCreary is almost like a gift and a curse. Because I've kind of found myself, you know. I'm in a very violent, hostile environment, and for me to maneuver around all that, be a likable guy, be in the church community and get around that, I mean, to me it's like a big step up for me.

So I just want to say that I see the change in myself. You know, I know a lot of people might come up and say, well, I'm doing it for my kids or my mother, I'm doing it for them. I'm doing it for me first. That's just

what I want [28] to say. I am a different person. Thank you.

THE COURT: Thank you.

MS. TOSIC: If I may add one more thing that I forgot to say.

THE COURT: Sure.

MS. TOSIC: Mr. Quarles also completed this one thinking class.

THE DEFENDANT: Well, that's the class I'm in. I'm in an anger, thinking and anger class.

MS. TOSIC: Anger management. Because previously the Court indicated when there was some hostile situation that Mr. Quarles tends to kind of lose his common sense and commit a crime. So he's addressing that through that class. Thank you.

THE DEFENDANT: Your Honor, I just want to state, that's one of the reasons why I waived my appearance, because it's a year-long class and I'm in the unit for it, so I didn't want to lose that bed space. So that is one of the reasons why I waived my appearance. But --

THE COURT: Did you end up losing it?

THE DEFENDANT: No, no, they are going to let me back into the program.

THE COURT: Good. I'm glad. Okay. Thanks. I appreciate that.

Anything else at this point, Ms. Tosic?

MS. TOSIC: No, thank you, Your Honor.

[29] *THE COURT*: Mr. Lewis?

MR. LEWIS: Your Honor, I'm glad to hear that Mr. Quarles is doing well, and I certainly hope that the change that he feels is real. Unfortunately, the best predictor of future conduct is past performance, and I think the Court really did get it right the first time when we were here before when he looked at the defendant's conduct in this case and the long history of violence, particularly gun violence, violence involving women. And the Court fashioned a sentence, and I would ask the Court to reimpose the same sentence or in that same vicinity.

I'll just be brief because I know the Court is familiar with the facts of the case. But within four months of being released for shooting at someone, the defendant acquired a gun and threatened two women. That would be bad enough, but when the Court looks at the litany of similar conduct over the years, I think the Court rightly observed that there's a dangerous mix for the defendant of firearms, a former girlfriend, and when he gets intoxicated, be it drugs or alcohol.

This type of conduct with this type of history is what the ACCA was designed for, and we would ask the Court to impose an appropriate sentence in light of that history and conduct. Thank you.

THE COURT: All right. Thank you.

[30] Well, I want to thank the parties for addressing all of these issues again. You come back to a case after whatever time has passed and everybody is in a different place. And the question is still what's appropriate under Section 3553 considering the underlying offense conduct, considering all of the individual circumstances that are a part of us, both pro and con for the defendant, both pro and con for the government.

Where do we balance everything out? And I have no doubt that as I hear Mr. Quarles today that he is taking advantage of the things that have been offered to him and that that's all to the good. It's all positive.

I also feel like it's very difficult in sentencing in this case to let that make up for what is a long list of trouble. Not just trouble but serious trouble. The kind of thing I summarized in the first go around and will just incorporate here. The kind of thing that the government had in its original sentencing memorandum on page 2 summarizing the litany of issues from 2000 to 2008. Which are all the, you know, the volatile mix of the drugs, the anger, the violence, and usually an ex-girlfriend, sometimes a present girlfriend. And alcohol, if I didn't say alcohol. That might even be more important than other illegal drugs for this particular defendant. And that's still there. And although I'm so glad that we see improvement for Mr. Quarles, that we see him taking a more positive engagement -- and I can hear in his words today [31] a desire to do that, and I'm glad he came to talk today, even though he had to do some extra work to preserve his placement in the program that he's going back to -- there's still a concern that I think the history justifies here that when he's outside of the structured setting of the Bureau of Prisons, all of those triggers and factors and dangers that led to all of the other things we see in the presentence report reignite.

I, frankly, imagine that when Mr. Quarles wasn't high on drugs or drunk on alcohol or enraged by an ex-girlfriend that he was probably the same personable, intelligent, articulate kind of person we hear today and that he was able to address at his first sentencing.

But I think the Section 3553 factors still balance out where the Court was at the original sentence. And although I recognize that the defense can and should appeal the ruling on the ACCA, and we'll see what the circuit says about that, if the circuit affirms that, if in fact Mr. Quarles does qualify as I've held for the Armed Career Criminal Act enhancement even apart from the residual clause, then I think his record and what we see in the file makes him the kind of person that the ACCA was directed to. Not an accidental application but somebody that through a series of actual encounters visited violence on people that were close to him with guns while on supervision to other courts, in this case the State of Michigan, and that's exactly the kind of danger that I think [32] we're meant to address when the ACCA applies. So I intend to impose the same sentence I did the first time, and if the circuit thinks the ACCA ruling is wrong, we'll come back, we'll do this another time. And, of course, then the whole array is different because then we'd have a count of conviction that has a 10-year cap. But once this ruling is affirmed, if it is, I would still balance these factors in the same way that I did the first time, and so I'm going to reimpose that, at least that's my intent to do it, with the 204 months of custody for the reasons indicated today and incorporate it from the original sentencing. And I also intend the same recommendations I made before, which is ongoing substance abuse assessment and treatment and mental health counseling and treatment. And the terms of supervised release, the Court intends again a five-year term of supervised release on the normal mandatory terms which include cooperation in the collection of DNA, the ban on firearms, and no -- and drug testing. And that standard conditions including no alcohol. And special

conditions that Mr. Quarles participate in a program of testing and treatment for substance abuse as directed by the probation officer until released, paying a portion of the costs as he's determined able. Next, that he participate in a program of mental health treatment which may include MRT or cognitive restructuring programming as directed by the probation officer until released, paying a portion of [33] the costs as he's determined able. (3) that he provide the probation officer with access to requested financial information. And (4) that he maintain legitimate full-time employment approved by the probation officer.

In terms of the fine, the Court intends the fine of $2,500, which is below guidelines, but appropriately so in my view based on ability to pay. The normal custodial terms continue for that, which would be 25 minimum quarterly dollar payments for the IFRP program or minimum monthly installments of $20 otherwise, with a balance due on supervision in minimum monthly installments of $25. The forfeiture of the 45-caliber semiautomatic Charles Daly I also intend once again. And the special assessment is $100.

So that's the overall intended sentence of the Court. For the government, legal objections?

MR. LEWIS: No, thank you, Your Honor.

THE COURT: Okay. And, Ms. Tosic, other than the ones you've preserved, other legal objections?

MS. TOSIC: We do preserve our objections to both of the arguments raised here, that Mr. Quarles should not be -- does not qualify for the armed career criminal enhancement and also that his prior conviction for two of the misdemeanor offenses should not be scored.

THE COURT: Sure. Okay. And I understand those and those are preserved, but I'm going to go ahead, then, and [34] impose the sentence as I announced my intent to do it, which is a custodial term of 204 months, supervised release of five years, and a fine of $2,500, the forfeiture of the 45-caliber semiautomatic, and the special assessment of $100.

And I'll impose it again, Mr. Quarles. I'll make it the judgment of the Court once again. You know the road to Cincinnati. And talk to Ms. Tosic about that. Because as I indicated, I think that's an issue the Court of Appeals needs to settle. But make sure you let her know you want to appeal, and she'll do that for you within 14 days.

Do you have any other questions?

THE DEFENDANT: As far as the $100 assessment fee, are they going to stack it on me?

THE COURT: It's not a new one. No, it would be a vacated one. So I'm imposing it again. If you've already paid that, you'll get credit for that. But that's my intent. Okay?

THE DEFENDANT: Yep.

THE COURT: And I hope things continue to go well for you. I know you hoped for a different outcome today, but regardless, I'm glad you're continuing to make use of the programs, and I hope you continue to do that.

THE DEFENDANT: Thank you.

THE COURT: Anything else, Ms. Tosic?

MS. TOSIC: No, Your Honor.

THE COURT: Mr. Lewis?

[35] *MR. LEWIS*: No, thank you.

THE COURT: All right. Thank you.

THE CLERK: Court is in recess.

(Proceeding concluded at 2:57 p.m.)

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I further certify that the transcript fees and format comply with those prescribed by the court and the Judicial Conference of the United States.

Date: June 20, 2016

/s/ Glenda Trexler

Glenda Trexler, CSR-1436, RPR, CRR

APPENDIX J

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,	AMENDED JUDGMENT IN A CRIMINAL CASE (Note Changes with Asterisks **)
v.	Case Number: 1:14-CR-29-01
	USM Number: 18038-040
JAMAR ALONZO QUARLES	Jasna Tosic
	Defendant's Attorney

Date of Imposition of Original Judgment: February 13, 2015
(Or Date of Last Amendment Judgment)

Reason for Amendment: Correction of Sentence on Remand (18 U.S.C. § 3742(f)(1) and (2))

THE DEFENDANT:

☒ pleaded guilty to the one-count Indictment.
☐ pleaded nolo contendere to Count(s) ___, which was accepted by the court.
☐ was found guilty on Count(s) ___ after a plea of not guilty.

The defendant is adjudicated guilty of these offense(s):

Title & Section	Offense Ended	Count No.
18 U.S.C. § 922(g)(1), 924(a)(2) and 924(e)(1)	8/24/13	1

Nature of Offense

Felon in Possession of a Firearm

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Dated: May 17, 2016

Date of Imposition of Sentence: May 16, 2016

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **two hundred and four (204) months**.

☒ The Court makes the following recommendations to the Bureau of Prisons:

The defendant be evaluated for substance abuse and provided treatment, if necessary.

The defendant be evaluated for mental health counseling and provided treatment, if necessary.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The Defendant shall surrender to the United States Marshal for this district:

- ☐ At _____ on _____.
- ☐ As notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ Before 2:00 P.M. on _____.
- ☐ As notified by the United States Marshal.
- ☐ As notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ To _____

At_____, with a certified copy of this judgment.

_____

United States Marshal

By: _____

Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **five (5) years**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer.

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) As directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.

☐ The defendant shall participate in an approved program for domestic violence.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;

7. The defendant shall refrain from all use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where

controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate in a program of testing and treatment for substance abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer, and shall pay at least a portion of the cost according to his ability, as determined by the probation officer.

2. The defendant shall participate in a program of mental health treatment, which may include cognitive restructuring programming (MRT), as directed by the probation officer, until such time as the defendant is released from the program by the probation officer, and shall pay at least a portion of the cost according to his ability, as determined by the probation officer.

3. The defendant shall provide the probation officer with access to any requested financial information.

4. The defendant shall maintain full-time employment as approved by the probation officer.

CRIMINAL MONETARY PENALTIES[1]

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on the following pages.

Assessment	Fine	Restitution
$100.00	$2,500.00	-0-

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss	Restitution Ordered	Priority or Percentage

☐ Restitution amount ordered pursuant to plea agreement: $

☐ The defendant must pay interest on restitution and/or a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after

---

[1] Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options in the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The Court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the fine.

☐ the interest requirement is waived for the restitution.

☐ the interest requirement for the fine is modified as follows:

☐ the interest requirement for the restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of **$100.00** due immediately, balance due
☐ not later than _____, or
☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F, below; or

B ☐ Payment to begin immediately (may be combined with C, D, or F, below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment, or

D ☐ Payment in equal _____(e.g., weekly, monthly, quarterly) installments of $ ____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

The fine is to be paid in minimum quarterly

installments of $25.00 based on IFRP participation, or minimum monthly installments of $20.00 based on UNICOR earnings, during the period of incarceration, to commence 60 days after the date of this judgment. Any balance due upon commencement of supervision shall be paid, during the term of supervision, in minimum monthly installments of $25.00 to commence 60 days after release from imprisonment. The defendant shall apply all monies received from income tax refunds, lottery winnings, judgments, and/or any other anticipated or unexpected financial gains to any outstanding court-ordered financial obligations.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court, 399 Federal Building, 110 Michigan N.W., Grand Rapids, MI 49503, unless otherwise directed by the court, the probation officer, or the United States Attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Joint and Several Amount, and corresponding payee, if appropriate:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States: Charles Daly, .45 caliber semiautomatic pistol

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX K

United States District Court for the Western District of Michigan

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	**CASE NO.** 1:14-CR-29-01
JAMAR ALONZO QUARLES,	)	
Defendant.	)	

Notice is hereby given that Jamar Alonzo Quarles, hereby appeal to the United States Court of Appeals for the Sixth Circuit from the Amended Judgment entered in this action on the 17th day of May, 2016.

(s) /s/ Jasna Tosic
Address: Federal Public Defenders
50 Louis NW, Suite 300
Grand Rapids, Michigan 49503

Attorney for Jamar Alonzo Quarles

cc: Opposing Counsel ☑
Court of Appeals ☑

APPENDIX L

(Order List: 586 U.S.)

FRIDAY, JANUARY 11, 2019

CERTIORARI GRANTED

17-778 QUARLES, JAMAR A. V. UNITED STATES

The petition for a writ of certiorari is granted.

* * *

No. 17-778

In the Supreme Court of the United States

JAMAR ALONZO QUARLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

The Armed Career Criminal Act, 18 U.S.C. § 924(e), imposes a mandatory minimum prison term of 15 years upon any convicted felon who unlawfully possesses a firearm and who has three or more prior convictions for any "violent felony or * * * serious drug offense." The definition of a "violent felony" includes a burglary conviction that is punishable by imprisonment for a term exceeding one year. See *id.* § 924(e)(2)(B)(ii). In *Taylor* v. *United States*, 495 U.S. 575 (1990), this Court held that § 924(e) uses the term "burglary" in its generic sense, to cover any crime "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 598-599.

The question presented is:

Whether *Taylor*'s definition of generic burglary requires proof that intent to commit a crime was present at the time of unlawful entry or first unlawful remaining.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 850 F.3d 836.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 2017, and a timely petition for rehearing en banc was denied on June 28, 2017. Justice Kagan extended the time in which to file a petition for a writ of certiorari to November 24, 2017, and the petition was filed on that day. The Court granted the petition on January 11, 2019. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent portions of the relevant statutory provisions—18 U.S.C. §§ 922(g) and 924, and Mich. Comp. Laws § 750.110a—appear in the appendix to the petition for a writ of certiorari. Pet. App. 11a-17a.

INTRODUCTION

The Armed Career Criminal Act (ACCA) imposes a 15-year mandatory minimum sentence on any convicted felon who unlawfully possesses a firearm and who has three or more prior convictions for any "violent felony or * * * serious drug offense." 18 U.S.C. § 924(e)(1). ACCA defines a "violent felony," in relevant part, as any crime "punishable by imprisonment for a term exceeding one year" that "is burglary." *Id.* § 924(e)(2)(B)(ii). This Court has held that ACCA uses the term "burglary" in its generic sense, meaning it has the "basic elements of [1] unlawful or unprivileged entry into, or remaining in, [2] a building or structure, [3] with intent to commit a crime." *Taylor* v. *United States*, 495 U.S. 575, 599 (1990). That definition reflects how the offense of burglary was defined "in the criminal codes of most States" around the time of

ACCA's enactment in the mid-1980s. *Id.* at 598; see also *United States* v. *Stitt*, 139 S. Ct. 399, 406 (2018) (adopting ACCA interpretation consistent with how "a majority of state burglary statutes" defined the offense "[i]n 1986").

At common law, it was well established that burglary required proof that the defendant intended to commit another crime at the time of his unlawful entry into the premises. *E.g.*, Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13(e), at 473 & n.101 (1986). The question here is whether the generic definition of burglary under ACCA retains that longstanding contemporaneous-intent requirement, such that a state offense does not qualify as ACCA "burglary" if it does not require proof that the defendant intended to commit another offense at the time he unlawfully entered, or first unlawfully remained in, the premises.

Taylor resolves that question. *Taylor* envisioned two alternative means of committing generic burglary: "unlawful or unprivileged entry * * * with intent to commit a crime," and "unlawful or unprivileged * * * remaining * * * with intent to commit a crime." 495 U.S. at 598. The "remaining" prong must refer to the initial moment when the privilege to be in lawfully entered premises ceases. Otherwise, the alternative "entry" prong would be superfluous: For all practical purposes, every unlawful entry is immediately followed by unlawful "remaining in" the illegally entered premises. Therefore, just as the "entry" prong refers to a particular moment in time at which the "intent to commit a crime" must exist, the parallel "remaining" prong is most naturally read as referring to the initial

moment of unlawful "remaining," and requires the intent to commit another crime to exist at that time.

This conclusion is consistent with the prevailing understanding of burglary when ACCA was enacted in 1984 and amended in 1986. Leading authorities at that time—including LaFave and Scott's *Substantive Criminal Law* treatise and the Model Penal Code, both of which this Court cited in *Taylor*, 495 U.S. at 598 & n.8—recognized the continuing vitality of the common-law contemporaneous-intent requirement. And at that time, a substantial majority of state burglary laws continued to require proof of contemporaneous intent; only a small minority of states had dispensed with that requirement.

Demanding proof of contemporaneous intent is also consistent with Congress's objective of focusing ACCA's stringent penalties on a discrete category of dangerous career criminals. The government (and the Sixth Circuit's decision below) would extend ACCA to a homeless defendant with a handful of convictions for committing low-risk, spur-of-the-moment crimes of opportunity, such as stealing clothing or food, while trespassing to seek shelter from the cold. But there is no indication that Congress would have viewed such defendants as "career" offenders who make their livelihood from crime, or as the kind of dangerous criminals who are likely to "use [a] gun deliberately to harm a victim." *Begay* v. *United States*, 553 U.S. 137, 145 (2008).

The government's request that this Court dispense with the contemporaneous-intent requirement lacks any basis in ACCA's text, history, or purpose and conflicts with this Court's precedent and prevailing state

practice around the time of ACCA's enactment. This Court should hold that a state offense qualifies as generic burglary under ACCA only if it requires proof of contemporaneous intent. Because the ACCA predicate at issue here—a 2001 Michigan conviction for home invasion in the third degree, Mich. Comp. Law § 750.110a(4)—did not require such proof, the judgment below should be reversed.

STATEMENT

1. Under 18 U.S.C. § 922(g)(1), it is unlawful for an individual who has previously been convicted of a felony (*i.e.*, "a crime punishable by imprisonment for a term exceeding one year") to possess a firearm. 18 U.S.C. § 922(g)(1). The maximum prison sentence for violating § 922(g)(1) is usually ten years. *Id.* § 924(a)(2). ACCA, however, replaces that ten-year maximum with a 15-year *minimum* sentence for individuals convicted under § 922(g)(1) who have three or more prior convictions for certain qualifying offenses. 18 U.S.C. § 924(e).

When Congress originally enacted ACCA in 1984, it limited the predicate offenses that could trigger the 15-year minimum to "robbery" and "burglary." Pub. L. No. 98-473, ch. 18, 98 Stat. 1837, 2185 (1984). The statute defined burglary as "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." *Ibid.*

Congress enacted ACCA because of concerns about "the large proportion of crimes committed by a small number of career offenders, and the inadequacy of state prosecutorial resources to address this problem." *Taylor* v. *United States*, 495 U.S. 575, 583 (1990). In

particular, the 1984 Congress "singled out burglary (as opposed to other frequently committed property crimes such as larceny and auto theft) for inclusion as a predicate offense * * * because of its inherent potential for harm to persons." *Id.* at 588. "The fact that an offender enters a building to commit a crime often creates the possibility of a violent confrontation between the offender and an occupant," and "the offender's own awareness of this possibility may mean that he is prepared to use violence if necessary to carry out his plans or to escape." *Ibid.*

In 1986, Congress amended ACCA to expand the predicate offenses triggering the sentence enhancement from simply "robbery or burglary" to any "violent felony or * * * serious drug offense." Pub. L. No. 99-570, § 1402, 100 Stat. 3207, 3207-39 (1986) (codified as amended at 18 U.S.C. § 924(e)). The amended statute defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B). In what this Court would later conclude appears to "have been an inadvertent casualty of a complex drafting process," Congress in 1986 deleted the 1984 Act's definition of "burglary." *Taylor*, 495 U.S. at 589-590.

In its 1990 decision in *Taylor*, this Court addressed the meaning of the term "burglary" in the absence of a

statutory definition. The Court held that, as used in § 924(e), "burglary" refers to "the generic sense in which the term is now used in the criminal codes of most States." 495 U.S. at 598. According to *Taylor*, generic burglary includes any crime, "regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599. In support of that definition, the Court cited the 1986 edition of Wayne R. LaFave and Austin W. Scott, Jr.'s *Substantive Criminal Law* treatise and the Model Penal Code. *Id.* at 598 & n.8. The Court also emphasized that this generic definition of burglary "is practically identical" to the burglary definition set forth in the 1984 Act. *Id.* at 598.

2. To find that a predicate offense qualifies as generic burglary under ACCA, a court must use a "categorical approach," which "focus[es] solely on whether the elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the particular facts of the case." *Mathis* v. *United States*, 136 S. Ct. 2243, 2248 (2016). A crime cannot qualify as an ACCA predicate if its elements are broader than those of the generic offense. *Id.* at 2251. This is true "even if the defendant's actual conduct (*i.e.*, the facts of the crime) fits within the generic offense's boundaries." *Id.* at 2248. In such a case, "the mismatch of elements saves the defendant from an ACCA sentence." *Id.* at 2251. This elements-focused approach accords with ACCA's text and reflects this Court's recognition that the Sixth Amendment precludes increasing a defendant's maximum sentence based on a judge's factual findings regarding "the manner in which the defendant committed [a prior]

offense." *Id.* at 2252. It also avoids "unfairness to defendants." *Id.* at 2253. As this Court explained in *Mathis*:

> Statements of non-elemental fact in the records of prior convictions are prone to error precisely because their proof is unnecessary. At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he may have good reason not to—or even be precluded from doing so by the court. When that is true, a prosecutor's or judge's mistake as to means, reflected in the record, is likely to go uncorrected. Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence.

Ibid. (citations omitted).

When a single statute lists elements in the alternative, this Court has approved use of a "modified categorical approach," under which sentencing courts can look to a limited class of documents to determine the version of the crime of which the defendant was convicted, and its basic elements.[1] *Mathis*, 136 S. Ct. at 2249. When the predicate offense was decided by a jury, the sentencing court may look to the charging document and jury instructions. *Taylor*, 495 U.S. at 602. When the predicate offense resulted from a guilty plea, the sentencing court may look to "the charging

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[1] Although Quarles argued below that his conviction under Mich. Comp. Law § 750.110a(4) does not constitute a conviction for generic burglary under the modified categorical approach, neither the district court nor the Sixth Circuit had occasion to reach the issue, having resolved his challenge on the threshold question presented here.

document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Shepard* v. *United States*, 544 U.S. 13, 26 (2005).

The class of approved documents is necessarily limited to those "approaching the certainty of the record of conviction" so that the sentencing judge can avoid making a disputed finding of fact that implicates Sixth Amendment concerns. *Shepard*, 544 U.S. at 23-25 ("[A]ny fact other than a prior conviction sufficient to raise the limit of the possible federal sentence must be found by a jury, in the absence of any waiver of rights by the defendant." (citing *Jones* v. *United States*, 526 U.S. 227, 243 n.6 (1999))).

3. Petitioner Jamar Quarles pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). J.A. 115-116. The question presented in this case stems from the parties' dispute about whether Quarles's 2001 Michigan conviction for home invasion in the third degree qualifies as "burglary" under ACCA. See J.A. 24-28 (Quarles's state-court information and judgment). The Michigan statute under which Quarles was convicted, Mich. Comp. Law § 750.110a(4), provides:

> A person is guilty of home invasion in the third degree if the person * * *
>
> (a) Breaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or breaks and enters a dwelling or enters a dwelling without

permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor.

To convict Quarles under this statute, all the prosecution had to establish was that Quarles "commit[ted] a misdemeanor" while "present in" a dwelling that he had "enter[ed] * * * without permission" (or had broken and entered). The prosecution was not required to prove that Quarles harbored any intent to commit another offense when he unlawfully entered the dwelling, or at any other time preceding the misdemeanor's commission. Indeed, for a defendant accused of committing a strict-liability offense or a misdemeanor with a scienter requirement of only negligence or recklessness, the prosecution could obtain a conviction under § 750.110a(4) without proving that the defendant ever intended to commit any offense beyond criminal trespass See, *e.g.*, Mich. Comp. Laws § 750.520e(1)(a) (misdemeanor statutory-rape provision); *People* v. *Cash*, 351 N.W.2d 822, 824-828 (Mich. 1984) (statutory rape involves "strict liability"). In effect, § 750.110a(4) converts any misdemeanor into a felony punishable by up to five years of imprisonment if the defendant happens to commit the misdemeanor while present in a dwelling that he entered without permission. See Mich. Comp. Law § 750.110a(7).

Section 750.110a(4) is a recent innovation. At the time of ACCA's 1984 enactment and 1986 revision, Michigan's burglary analogues required proof that the defendant entered a structure "with intent to commit" a felony or larceny therein. Mich. Comp. Law §§ 750.110, 750.111 (1968). In 1994, the Michigan legislature first enacted the home-invasion statute under which Quarles was convicted. Like prior law, however,

the 1994 statute continued to require the prosecution to establish that the defendant entered a dwelling "with intent to commit a felony or a larceny." 1994 Mich. Pub. Acts 1264. Not until 1999—over a decade after ACCA's enactment and subsequent revision—did the Michigan legislature amend § 750.110a to proscribe commission of misdemeanors within dwellings entered without permission. 1999 Mich. Pub. Acts 120, 120-121.

4. Before his guilty plea, Quarles sought the district court's determination whether his third-degree home invasion conviction constituted a "violent felony" under ACCA. R.15. The court declined to make that determination before sentencing. R.19 at 65. Quarles then pleaded guilty.

At sentencing, Quarles's final presentence report identified only three convictions as crimes of violence, including his 2001 Michigan conviction for third-degree home invasion. R.25 ¶¶ 51, 54, 56. Quarles argued that the 2001 conviction does not satisfy the elements of generic burglary under *Taylor* and thus does not qualify as a "violent felony" under ACCA.[2] R.50 at 376-377 (Sentencing Memorandum); J.A. 93-94. Quarles contended that § 750.110a(4) lacks the requisite *Taylor* elements because it does not require proof of intent to commit a crime at the moment the defendant entered or first unlawfully remained inside the building. *Ibid.* The district court concluded that a

[2] The district court originally ruled that Quarles's Michigan conviction was a violent felony under ACCA's residual clause. J.A. 83. Quarles appealed, and the Sixth Circuit remanded for resentencing in light of *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), which held that the residual clause is unconstitutionally vague. See J.A. 83.

conviction under § 750.110a(4)(a) constitutes generic burglary under ACCA, J.A. 104, and on May 16, 2016, sentenced Quarles to 204 months' imprisonment, J.A. 117.

5. The court of appeals affirmed. Pet. App. 1a-8a. The court acknowledged that "[t]he question of whether generic burglary requires intent at entry has resulted in a circuit split * * * [that] hinges on whether the 'remaining in' language allows for the development of intent at any point or whether the intent must exist" at the time the defendant enters or first unlawfully remains inside the building. *Id.* at 7a. But according to the court of appeals, "someone who enters a building or structure and, while inside, commits or attempts to commit a felony will necessarily have remained inside the building or structure to do so." *Id.* at 8a (quoting *United States* v. *Priddy*, 808 F.3d 676, 685 (6th Cir. 2015)). Thus, the court held that "generic burglary * * * does not require intent at entry; rather the intent can be developed while 'remaining in.'" *Ibid.* The court of appeals denied Quarles's timely petition for rehearing en banc. *Id.* at 9a-10a.

SUMMARY OF ARGUMENT

Quarles's third-degree home invasion conviction does not qualify as ACCA "burglary" because it did not require proof that Quarles intended to commit a crime at the time of his initial unlawful entry or remaining. In *Taylor*, this Court held that, in enacting and amending ACCA in the mid-1980s, Congress adopted "the generic, contemporary meaning of burglary," with three elements: "[1] an unlawful or unprivileged entry into, or remaining in, [2] a building or other structure, [3] with intent to commit a crime." 495 U.S. at 598-599. By its plain language, that definition requires

intent to commit a crime to exist contemporaneously with the unlawful or unprivileged entry or initial unlawful or unprivileged remaining. "Entry" indisputably refers to a particular moment in time. Similarly, the parallel "remaining" prong is most naturally read as referring to the initial moment of unlawful or unprivileged presence—at which time the "intent to commit a crime" must exist. By contrast, if "remaining" refers to a continuous condition rather than a discrete moment in time, the "entry" prong would be superfluous; effectively every unlawful entry would immediately be followed by unlawful "remaining."

As leading English and American authorities demonstrate, the requirement that the offender intended to commit another crime at the moment of initial unlawful occupation has for centuries been considered a fundamental component of the offense of burglary. Indeed, the two authorities on which *Taylor* principally relied in defining "the generic, contemporary meaning of burglary"—the 1986 edition of LaFave and Scott's *Substantive Criminal Law* treatise and the Model Penal Code—both unequivocally took the position that burglary requires proof of contemporaneous intent. The longstanding importance of the contemporaneous-intent requirement reflects burglary's status as a special form of the inchoate crime of "attempt"—the foundational element of which is the intent to commit an offense.

The government cannot show that when Congress enacted and amended ACCA in the mid-1980s, state laws had evolved to such an extent that "most States" had dispensed with the contemporaneous-intent requirement. *Taylor*, 495 U.S. at 598. As of 1986, a substantial majority of states (at least 37) retained a

contemporaneous-intent requirement, while only a small minority of states had dispensed with it, and in still other states the law was unsettled.

The contemporaneous-intent requirement is also consistent with Congress's objective of reserving ACCA's stringent penalties for "a small number" of dangerous career criminals. *Taylor*, 495 U.S. at 583. Individuals who commit spur-of-the-moment crimes of opportunity while trespassing are not the professional criminals whom ACCA targets. Nor do their unplanned crimes suggest that they are the kind of violent person likely to "deliberately point [a] gun and pull the trigger." *Begay* v. *United States*, 553 U.S. 137, 146 (2008).

At minimum, the rule of lenity requires resolving any ambiguity regarding burglary's generic definition in Quarles's favor. Requiring proof of contemporaneous intent would also avoid the serious due process concerns of vagueness that would result from jettisoning such a deep-rooted and widely adopted component of the common-law offense.

ARGUMENT

For centuries, a defining characteristic of the offense of burglary was the required showing of contemporaneous intent: The defendant must have intended to commit an additional offense "at the time" of his unlawful entry into the relevant structure. Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13(e), at 473 & n.101 (1986) (LaFave & Scott (1986)). To prevail here, the government must show that by "the time [ACCA] was passed" in 1984 and amended "[i]n 1986," that settled understanding of burglary had evolved to such an extent that "a

majority of state burglary statutes" extended to individuals who lacked intent to commit another offense either at the time of entry or at the time of their initial unlawful presence in the premises. *United States* v. *Stitt*, 139 S. Ct. 399, 406 (2018).

The government cannot make that showing. Its rejection of the contemporaneous-intent requirement conflicts with *Taylor*'s articulation of "the generic, contemporary meaning of burglary" at the time of ACCA's enactment, as well as with the understanding in the principal authorities on which *Taylor* relied—Congress's 1984 definition of burglary, the 1986 edition of LaFave and Scott's *Substantive Criminal Law* treatise, and the Model Penal Code. The government's position also conflicts with the majority position among states in the mid-1980s that burglary required proof of the defendant's intent to commit another offense *at the time* of the defendant's unlawful entry or initial unlawful remaining. Finally, any attempt to extend ACCA to prior convictions for crimes of opportunity while trespassing conflicts with Congress's intent to focus ACCA's stringent 15-year mandatory minimum penalty on *career* offenders who make their livelihood from crime and are likely to "use [a] gun deliberately to harm a victim." *Begay*, 553 U.S. at 145.

The Sixth Circuit thus erred by holding that "the 'remaining in' language" in *Taylor*'s definition of burglary "allows for the development of intent at any point" while the defendant is unlawfully present in the premises. Pet. App. 7a-8a. Once that definitional error is corrected, it is clear that the Michigan statute involved here sweeps far beyond the definition of generic burglary. See Mich. Comp. Laws § 750.110a(4)(a). The offense defined by this provision

is broader than the generic definition of burglary because it allows conviction for simply "commit[ing] a misdemeanor" while "present in" "a dwelling" "without permission." *Ibid.* The judgment below must therefore be reversed.

I. *TAYLOR* AND ACCA DEMAND CONTEMPORANEOUS INTENT

In *Taylor*, this Court rejected the notion that ACCA reaches any crime that happens to carry the title "burglary." 495 U.S. at 590-592. Instead, the Court concluded that, in enacting and amending ACCA in the mid-1980s, Congress adopted "the generic, contemporary meaning of burglary," with three elements: "[1] an unlawful or unprivileged entry into, or remaining in, [2] a building or other structure, [3] with intent to commit a crime." *Id.* at 598-599. This definition is "practically identical" to ACCA's original statutory definition of "burglary," *id.* at 598, which covered "any felony consisting of entering or remaining surreptitiously within a building * * * *with intent to engage* in conduct constituting a Federal or State offense," 98 Stat. at 2185 (emphasis added). "[N]othing in [ACCA's legislative] history" suggests that "Congress intended in 1986 to replace the 1984 'generic' definition of burglary with something entirely different." *Taylor*, 495 U.S. at 590. Instead, "the deletion of the 1984 definition of burglary" appears to "have been an inadvertent casualty of a complex drafting process." *Id.* at 589-590.

"The most natural reading of *Taylor*" is that its definition of generic burglary "requires intent to commit a crime at the time of the unlawful or unprivileged entry or the initial 'remaining in' without consent." *United States* v. *McArthur*, 850 F.3d 925, 939 (8th Cir.

2017) (Colloton, J.). *Taylor* presents "remaining in" as "an alternative means to 'entry.'" *United States* v. *Bernel-Aveja*, 844 F.3d 206, 218 (5th Cir. 2016) (Higginbotham, J., concurring in judgment). Because "entry" refers to a particular moment in time, the parallel "remaining prong" is most naturally read as similarly referring "to the *initiation* of the trespass." *Ibid.* Therefore, like entry, "[t]he act of 'remaining in' a building, for purposes of generic burglary, is not a continuous undertaking"; rather, "it is a discrete event that occurs at the moment when a perpetrator, who at one point was lawfully present, exceeds his license and overstays his welcome." *McArthur*, 850 F.3d at 939; accord *Van Cannon* v. *United States*, 890 F.3d 656, 665 (7th Cir. 2018) ("discrete, alternative acts"). And *Taylor*'s use of the word "with" in defining the intent requirement—"*with* intent to commit a crime"—indicates that "the intent [must] accompany" the defendant's initial unlawful "entry" or "remaining." *United States* v. *Bonilla*, 687 F.3d 188, 197 (4th Cir. 2012) (Traxler, C.J., dissenting) (citing *Webster's Encyclopedic Unabridged Dictionary of the English Language* 2183 (2001) (defining "with" as "accompanied by; accompanying")); see also *McArthur*, 850 F.3d at 939 (emphasizing *Taylor* definition's use of "with"); *Bernel-Aveja*, 844 F.3d at 218 (Higginbotham, J., concurring in judgment) (same).

The government's contrary reading would render *Taylor*'s "unlawful entry" language superfluous. *McArthur*, 850 F.3d at 939. If "remaining" refers to a continuous condition rather than a discrete moment in time, then "every unlawful entry with intent would become 'remaining in' with intent as soon as the perpetrator enters," so *Taylor*'s "unlawful entry" prong

would be meaningless. *Ibid.*; accord *Bernel-Aveja*, 844 F.3d at 218 (Higginbotham, J., concurring in judgment); see also *United States* v. *Herrold*, 883 F.3d 517, 532 (5th Cir. 2018) (en banc) (government's position "puts entry almost entirely out of focus; because all entry is followed by its version of remaining in, and because the remaining in lasts until departure, almost every instance of entry would automatically involve remaining in"). This Court has previously rejected government efforts to rewrite *Taylor*, emphasizing that "a good rule of thumb for reading [this Court's] decisions is that what they say and what they mean are one and the same." *Mathis*, 136 S. Ct. at 2254. To give full weight to *Taylor*'s carefully constructed definition of generic burglary, both "unlawful entry" and "remaining in" must be read as discrete moments when an unlawful occupation begins. Therefore, a crime is only generic burglary if this specific act is done "with intent to commit a crime."

Congress's 1984 definition of "burglary" confirms that the definition of generic burglary applicable to ACCA cases incorporates a contemporaneous-intent requirement. The 1984 definition covered "entering or remaining surreptitiously * * * with intent to engage in [criminal] conduct." 98 Stat. at 2185. That definition required the criminal intent to exist at the time the defendant was "remaining surreptitiously." Thus, under the 1984 definition, "burglary" would not encompass instances where a defendant hid himself inside a building while it was open to the public, came out of hiding after the building closed for the day, and *thereafter* formed the intent to commit an offense. Such a defendant could not be said to have "remain[ed] surreptitiously * * * with intent to engage in [criminal]

conduct." Therefore, the Sixth Circuit's conclusion that "the development of intent [can occur] *at any point*" while the defendant is unlawfully present in the premises (Pet App. 7a; emphasis added) conflicts with Congress's 1984 definition of burglary, which this Court viewed as "practically identical" to *Taylor*'s definition of generic burglary. *Taylor*, 495 U.S. at 598.

II. CONTEMPORANEOUS INTENT WAS A FUNDAMENTAL COMPONENT OF BURGLARY AT COMMON LAW, AND MOST STATES RETAINED THAT RULE WHEN ACCA WAS ENACTED

At common law, the requirement that the offender intended to commit another crime at the moment of initial unlawful occupation was a fundamental component of the offense of burglary. That remained true at the time of ACCA's enactment. As of the mid-1980s, a substantial majority of state burglary laws retained the contemporaneous-intent requirement; only a small minority had abandoned it. Because ACCA and this Court's case law call for courts to apply the generic definition of burglary as it existed when ACCA was enacted and amended in the mid-1980s, a state offense does not qualify as "burglary" under ACCA unless it requires proof that the defendant intended to commit another crime at the time of his initial unlawful entry or occupation.

A. Contemporaneous Intent Was A Fundamental Component Of Common-Law Burglary

"Burglary was defined by the common law to be the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony."

Taylor, 495 U.S. at 580 n.3 (citation omitted). Although this common-law definition incorporated some "arcane distinctions" that were no longer in general use at the time of ACCA's enactment—*e.g.*, the requirement that the entry occur "in the nighttime"—this case does not involve a peripheral element. *Id.* at 593. To the contrary, "[c]ontemporaneous intent was the essence of burglary at common law, as it was the element that distinguished the offense from trespass." *Bonilla*, 687 F.3d at 196 (Traxler, C.J., dissenting); accord *Van Cannon*, 890 F.3d at 665; *Bernel-Aveja*, 844 F.3d at 218 (Higginbotham, J., concurring in judgment) ("that the perpetrator trespass while already harboring intent to commit a further crime" is "the most fundamental character of burglary").

The most eminent English expositors of the common law emphasized the centrality of burglary's contemporaneous-intent requirement. Blackstone explained, "[I]t is clear[] that [the] breaking and entry must be with a felonious intent, otherwise it is only a trespass." 4 William Blackstone, *Commentaries on the Laws of England* 227 (1769). Sir Edward Coke similarly emphasized that unlawful entry into a home with intent to commit an offense other than a felony would not constitute burglary. Edward Coke, *The Third Part of the Institutes of the Laws of England* 65 (1644) (entering home "to beat, and not to kill," is "no burglary" because "the intent must be to commit felony"). And Joseph Chitty wrote:

> No breaking and entering * * * will be esteemed burglary unless the party intended, at the time, to commit a felony. For if the intent were only to commit a trespass, though it is possible death might ensue, it is not burglary; *as the felonious intention*

> *at the time of the breaking is necessary to constitute the offence.*

3 Joseph Chitty, *A Practical Treatise on the Criminal Law* 1095 (1816) (emphasis added) (citations omitted).

American treatise writers, including the authors of what was "[p]erhaps America's first homegrown treatise on criminal law,"[3] agreed: The "breaking and entry" required for common-law burglary "must be with a felonious intent, otherwise it is only a trespass." Harry Toulmin & James Blair, *A Review of the Criminal Law of the Commonwealth of Kentucky* 215 (1804). Accordingly, "[t]he intent must exist at the time of the breaking and entry"; "[i]f it is conceived for the first time after entry, and carried out, the crime is not committed." William L. Clark, Jr., *Hand-Book of Criminal Law* 238 (1894); accord M. Cherif Bassiouni, *Substantive Criminal Law* 340 (1978) ("Any intent to commit a felony which is acquired by an intruder after being on the premises—even though unlawfully—and which he or she did not have at the time of the breaking in and entry, is not burglary."). Because "[t]he intention to commit a felony must concur in point of time with the breaking and entering," "no burglary" occurs "[i]f the person breaking and entering the house merely intends to commit a trespass," even if "after he is in the house he * * * commit[s] a felony which he did not intend at the time he broke and entered." John G. Hawley & Malcolm McGregor, *The Criminal Law* 186 (1896); see also 2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 112 (3d ed. 1865) ("When the

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[3] Gerald Leonard, *Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 Buff. Crim. L. Rev. 691, 721 (2003).

object of the offender is to commit only a misdemeanor, and unintentionally what he does amounts to a felony in law, still, although he is indictable for this felony done, yet, as it was not intended, he is not guilty of burglary. The doctrine is, that there must be a particular intent to do a particular act, which act is a felony; and this intent must be proved to have existed in the mind of the defendant, as a matter of fact, not merely as a matter of law." (footnote omitted)).

The importance that the common law placed on the contemporaneous-intent requirement reflects the fact that burglary arose as a special form of "attempt" crime. See 3 Wayne R. LaFave, *Substantive Criminal Law* § 21.1(g) (3d ed. 2018) (LaFave (2018)). Burglary addressed at least two "defects [in] the traditional law of attempt." American Law Institute, Model Penal Code § 221.1, commentary, pp. 62-63 (Official Draft and Revised Comments 1980) (Model Penal Code (1980)). First, because the "common law of attempt ordinarily did not reach a person who embarked on a course of criminal behavior unless he came very close to his goal," intruders apprehended soon after breaking into a dwelling may "not have committed an attempt" under the common law because they may not yet "have arrived at the [precise] scene" of their intended crime. *Id.* at 63. Second, "even when the actor's conduct reached the stage where an attempt was committed, penalties for attempt [at common law] were disproportionately low as compared to penalties for the completed offense." *Ibid.*

The common-law offense of burglary "provided a partial solution to these problems": "Making entry with criminal intent an independent substantive offense carrying serious sanctions moved back the

moment when the law could intervene in a criminal design and authorized penalties more nearly in accord with the seriousness of the actor's conduct." Model Penal Code § 221.1, commentary, p. 63 (1980); accord *People* v. *Gaines*, 546 N.E.2d 913, 915 (N.Y. 1989). And because "every burglary is * * * an attempt to commit some other crime," burglary requires proof of the fundamental element of attempt—the intent to commit an offense. Model Penal Code § 221.1, commentary, p. 63 (1980); see also, *e.g.*, American Law Institute, Model Penal Code § 5.01, commentary, p. 305 (Official Draft and Revised Comments 1985) (noting "the common law requirement of purposive conduct as a prerequisite for attempt liability"); 2 LaFave § 11.3(a) (2018) ("mental state required for the crime of attempt * * * is an intent to commit some other crime"). "A defendant who simply trespasses with no intent to commit a crime inside a building does not possess the more culpable mental state that justifies punishment as a burglar." *Gaines*, 546 N.E.2d at 915.

B. Leading Commentators Around The Time Of ACCA's Enactment Continued To View Contemporaneous Intent As A Fundamental Requirement Of Burglary

Around the time of ACCA's enactment, leading commentators continued to view contemporaneous intent as a fundamental requirement of burglary, thus indicating that the Congress that enacted and amended ACCA understood the term "burglary" to encompass a contemporaneous-intent requirement. In defining "the generic, contemporary meaning of burglary" in *Taylor*, this Court relied principally on two authorities—the 1986 edition of LaFave and Scott's *Substantive Criminal Law* treatise and the American Law Institute's Model Penal Code. *Taylor*, 495 U.S. at 598 & n.8. Both unequivocally took the position that burglary requires proof of contemporaneous intent. See *McArthur*, 850 F.3d at 939 (citing LaFave and Scott and the Model Penal Code).

LaFave and Scott explained: "To have committed the offense of burglary at common law, one must have intended to commit a felony while fulfilling the other requirements." LaFave & Scott § 8.13(e), at 473 (1986). Therefore, in jurisdictions not recognizing a "remaining in" theory of burglary liability, "the intent must exist at the time of the entry." *Id.* at 473 n.101. "If the actor when he was breaking and entering only intended to commit a simple trespass, he was not guilty of a burglary although he in fact committed a felony after entering." *Id.* at 473. Even in jurisdictions recognizing the "remaining in" theory, "the requisite intent to commit a crime within need[ed]" to "exist *at*

the time the defendant unlawfully remained within." *Id.* § 8.13(b), at 468 (emphasis added).

Similarly, the Model Penal Code's definition of burglary requires proof that the defendant "enter[ed] a building or occupied structure * * * with purpose to commit a crime therein." Model Penal Code § 221.1(1) (1980). Thus, under the Model Penal Code, a purpose to commit another offense "must accompany the intrusion." *Id.* § 221.1, commentary, p. 75. The Model Penal Code's position ensures that burglary convictions will not be imposed on those who "intru[de] for such innocent purposes as sleep, [or] escape from inclement weather." *Id.* at 76. It also reflects the fact that "[m]ost [state] statutes in effect" when the Model Penal Code was completed in 1962 "required a specific intent at the time of the entry." *Id.* at 60 n.**, 64 n.6.

Other commentators writing in the decades preceding ACCA's enactment reached similar conclusions. A 1951 survey of state burglary laws noted: "Like the common law, almost all jurisdictions today define burglary so as to require intent to commit a crime other than the crime of burglary. *This intent must exist at the time of entry.*" Note, *A Rationale of the Law of Burglary*, 51 Colum. L. Rev. 1009, 1016 (1951) (emphasis added) (footnote omitted). The survey thus concluded that "[b]urglary may be considered generally to consist of a trespassory entry into certain buildings *with the intent to commit certain crimes therein*," meaning that "*every* burglar enters with intent to commit a further crime inside the building." *Id.* at 1020 (emphasis added). Another article emphasized that at common law, "the intent [to commit a felony] had to be present at the time of the entry, *not formed thereafter*." Minturn T. Wright III, Note, *Statutory Burglary—The*

Magic of Four Walls and a Roof, 100 U. Pa. L. Rev. 411, 413-414 (1951) (emphasis added). After surveying then-existing state laws, the article concluded that the "gravamen of the crime today" remained "the felonious intent of the burglar." *Id.* at 433; accord *id.* at 436 n.197.

C. At The Time Of ACCA's Enactment, Only A Small Minority Of States Had Rejected The Contemporaneous-Intent Requirement

Given the centuries of authority emphasizing contemporaneous intent as an essential element of the offense of burglary, the government faces a daunting burden here. It must show that by the mid-1980s, when Congress enacted and amended ACCA, state criminal codes had evolved to such an extent that "most States" had dispensed with the contemporaneous-intent requirement. *Taylor*, 495 U.S. at 598; see also, *e.g.*, *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 539 (2019) ("[I]t's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute." (citation omitted)). Absent such a showing, it must be presumed that Congress understood its use of the term "burglary" in ACCA to encompass the deeply rooted contemporaneous-intent requirement, which—as explained above—leading authorities viewed as retaining vitality at the time of ACCA's enactment. Cf. *Taylor*, 495 U.S. at 592, 594-595 (recognizing that "a statutory term is generally presumed to have its common-law meaning" unless "that meaning is obsolete or inconsistent with the statute's purpose"); 2B Norman Singer & Shambie Singer, *Sutherland Statutes and*

Statutory Construction § 50:1 (7th ed. 2018) ("All legislation is interpreted in the light of the common law and the scheme of jurisprudence existing at the time of its enactment.").

The government cannot make the requisite showing. Below (pp. 30-51, *infra*) is a summary of the burglary laws of all 50 states and the District of Columbia as of 1986, when ACCA was amended and the 1984 definition of "burglary" was deleted. See *Stitt*, 139 S. Ct. at 406 (surveying state of the law "[i]n 1986" in interpreting ACCA). As the summary shows, a substantial majority of states—at least 37—retained a contemporaneous-intent requirement as of 1986. By contrast, in 1986, only a small minority of states (9) had dispensed with the contemporaneous-intent requirement.[4]

The example of New York illustrates that, around the time of ACCA's enactment, contemporaneous intent was still widely considered to be a fundamental component of burglary. New York's burglary statutes, which have not been amended since 1981, apply to anyone who "knowingly enters or remains unlawfully in a [building or dwelling] with intent to commit a crime

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[4] The laws of the remaining states were ambiguous on this issue as of 1986—although even several of those strongly suggest retention of a contemporaneous-intent requirement. For the reasons explained above, see pp. 25-26, *supra*, ambiguity militates *against* adopting the government's position here: Given the centrality of the contemporaneous-intent requirement at common law, it should not be presumed that a state whose laws were ambiguous had rejected that requirement; to the contrary, it would be more reasonable to conclude that the ambiguity would likely be resolved in favor of retaining the longstanding contemporaneous-intent element.

therein." N.Y. Penal Law §§ 140.20-140.30 (McKinney 2019). In *People* v. *Gaines*, 546 N.E.2d 913, 914 (N.Y. 1989), the defendant was arrested as he emerged from the window of a building supply company. He was wearing clothing and a jacket taken from the building. *Ibid.* Other than some pens found in the jacket's pocket, the defendant took no other items from the building. *Ibid.* In his subsequent burglary prosecution, the defendant testified that he was homeless, had taken refuge in the building on a snowy night, and had put on the clothing and jacket to keep warm. *Ibid.* The trial court rejected the defendant's request that the jury be instructed that it had to find that the defendant intended to commit a crime when he unlawfully entered the building. *Ibid.*

The New York Court of Appeals considered whether jurors "should have been instructed that they must find defendant's intent to commit a crime in the building existed *at the time* of the entry, or whether no such instruction need have been given, because the 'remains unlawfully' element of the statute means that such intent may be formed *after* defendant's unlawful entry." *Gaines*, 546 N.E.2d at 914. Reversing the defendant's conviction, the court concluded that New York law required proof that the defendant "inten[ded] to commit a crime in the building * * * at the time of the unlawful entry." *Ibid.*

The court emphasized that at common law, "[u]nless the intent to commit a felony existed at the time of the breaking and entry, there was no burglary." *Gaines*, 546 N.E.2d at 914. The court determined that the New York legislature did not intend to override the "long-standing" contemporaneous-intent requirement when it adopted a "remaining in" theory of burglary.

Id. at 915. As the court explained, a "defendant who simply trespasses with no intent to commit a crime inside a building does not possess the more culpable mental state that justifies punishment as a burglar." *Ibid.* According to the court, "[b]y the words 'remains unlawfully' the Legislature sought to broaden the definition of criminal trespass, not to eliminate the requirement that the act constituting criminal trespass be accompanied by contemporaneous intent to commit a crime." *Ibid.* The court thus held:

> In order to be guilty of burglary for unlawful remaining, a defendant must have entered legally, but remain for the purpose of committing a crime after authorization to be on the premises terminates. And in order to be guilty of burglary for unlawful entry, a defendant must have had the intent to commit a crime at the time of entry. *In either event, contemporaneous intent is required.*

Id. at 915-916 (emphasis added).

Gaines—which was decided less than a year before *Taylor*—demonstrates that *Taylor*'s reference to "remaining in" liability did not constitute a repudiation of the deep-rooted contemporaneous-intent requirement. Indeed, the Delaware Supreme Court recognized in 2007 that "a majority" of states with statutes similar to New York's have "held that a person must form the intent to commit a crime in the dwelling either before entering the premises or contemporaneously upon entering the premises," while only a "minority of jurisdictions ha[d] held that a person may form the required intent to commit a crime 'therein' while he remains unlawfully in the dwelling," and the court chose to "join the majority" requiring proof of contemporaneous

intent. *Dolan* v. *State*, 925 A.2d 495, 499-501 (Del. 2007).[5]

To the extent that ambiguity exists regarding the generally understood meaning of burglary at the time of ACCA's enactment, the rule of lenity requires resolving the ambiguity in Quarles's favor. See, *e.g.*, *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980). Where, as here, "text, structure, and history fail to establish that the Government's position is unambiguously correct," the Court must resolve any "ambiguity in [the defendant's] favor." *United States* v. *Granderson*, 511 U.S. 39, 54 (1994); see also *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 285 (1978) ("doubts are resolved in favor of the defendant" (citation omitted)). Applying the rule of lenity here is particularly appropriate because deriving a "generic" definition of burglary from a survey of state laws is fraught with "significant challenges" because "[e]very state has its own statutory scheme, and the variation [among states] is enormous." Helen A. Anderson, *From the Thief in the Night to the Guest Who Stayed Too Long: The Evolution of Burglary in the Shadow of the Common Law*, 45 Ind. L. Rev. 629, 632 (2012).

Indeed, if this Court were to treat as "burglary" under ACCA state laws that reject such a fundamental component of the common-law offense as the contemporaneous-intent requirement, that would risk rendering ACCA's use of the term "burglary" profoundly, even unconstitutionally, vague. See generally

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[5] After *Dolan*, Delaware amended its burglary laws to provide that the intent to commit a crime "may be formed after the entry while the person remains unlawfully." 76 (pt. 2) Del. Laws 115 (2008) (codified at Del. Code Ann. tit. 11, § 829 (2019)).

Johnson v. *United States*, 135 S. Ct. 2551 (2015) (invalidating ACCA's residual clause as unconstitutionally vague). Given that only a small minority of states had rejected the contemporaneous-intent requirement at the time of ACCA's enactment, stripping that deep-rooted common-law element from the generic definition of burglary would "den[y] fair notice to defendants and invite[] arbitrary enforcement," *id.* at 2557, and would entail the type of unmoored judicial lawmaking against which the void-for-vagueness doctrine is aimed, see *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1212 (2018) (plurality op.); *id.* at 1227-1228 (Gorsuch, J., concurring); accord J.A. 103-104. This Court should reject the government's expansive conception of burglary to avoid those serious constitutional concerns. See, *e.g.*, *Skilling* v. *United States*, 561 U.S. 358, 408-409 (2010) (rejecting interpretation that "would raise the due process concerns underlying the vagueness doctrine").

Summary Of State Burglary Laws As Of 1986

States With A Contemporaneous-Intent Requirement

Alaska: Alaska courts interpreted their state's burglary statute, which prohibited both unlawful entry and remaining in a building with intent to commit a crime therein, to require contemporaneous intent. See Alaska Stat. Ann. §§ 11.46.300, 11.46.310 (West 1995); *Shetters* v. *State*, 751 P.2d 31, 36 n.2 (Alaska Ct. App. 1988) (if defendant "did not have an intent [to commit a crime] at the time his presence on the premises first became unlawful, he could not be convicted of burglary" because "[t]he intent to commit a further crime must co-exist with the initial criminal trespass").

Arkansas: Arkansas's definition of burglary penalized a defendant who "enters or remains unlawfully." Ark. Code Ann. § 5-39-201 (1987). *Hickerson* v. *State*, 667 S.W.2d 654, 655-656 (Ark. 1984), reversed the burglary conviction of a defendant who unlawfully entered a home, kidnapped a minor from the home, and then raped her, because there was no evidence "that, at the time [the defendant] entered the house, he intended to commit a felony."

California: California law defined burglary as the entry (which need not be unlawful) of certain premises with contemporaneous intent "to commit grand or petit larceny or any felony." Cal. Penal Code § 459 (West 1988); see also 2 Witkin, Cal. Crim. Law 4th Crimes—Property § 147 (2012) ("The prosecution must prove that the entry was made with the specific intent 'to commit grand or petit larceny or any felony.'").

Colorado: In 1986, the Colorado burglary statute applied to those who "enter[] or remain[] unlawfully in a building or occupied structure with intent to" commit the requisite crimes. Colo. Rev. Stat. Ann. § 18-4-202 (West 1986); see also *id.* § 18-4-203. The defendant's intent had to "coexist with the initial point of unlawful entry or remaining." *Cooper* v. *People*, 973 P.2d 1234, 1240 (Colo. 1999) (en banc), abrogated on other grounds by *Griego* v. *People*, 19 P.3d 1 (Colo. 2001); see also *People* v. *Barnhart*, 638 P.2d 814, 816 (Colo. App. 1981) (burglary requires proof "that the accused entered the building with intent to commit a crime").[6]

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[6] In 1999, Colorado "legislatively overruled *Cooper* with respect to the intent element of burglary." *People* v. *Bondurant*, 296 P.3d 200, 214 (Colo. App. 2012). The legislature altered the statutory language to apply to those who "remain[] unlawfully *after a*

Connecticut: Although Connecticut recognized a "remaining in" theory of burglary liability, Conn. Gen. Stat. Ann. §§ 53a-101, 53a-102, 53a-103 (West Supp. 1985), Connecticut courts held that the "remaining in" theory applies only to defendants who entered a building lawfully and then remained in the building after their privilege to do so had ended. See *State* v. *Belton*, 461 A.2d 973, 976 (Conn. 1983); *State* v. *Edwards*, 524 A.2d 648, 653 (Conn. App. Ct. 1987). For defendants who entered a building unlawfully, the plain statutory language required proof of contemporaneous intent—*i.e.*, that the defendant "enter[ed] * * * unlawfully * * * with intent to commit a crime." Conn. Gen. Stat. Ann. §§ 53a-101, 53a-102, 53a-103 (West Supp. 1985).

Delaware: Knowingly entering or remaining unlawfully in a building with intent to commit a crime constituted burglary. Del. Code Ann. tit. 11, §§ 824-826 (1979). Based on the crime's common-law origins, the Delaware Supreme Court held in *Dolan* v. *State* that the statutory offense continued to require intent to commit a crime within the building at the time of the initial unlawful occupation. 925 A.2d 495, 501 (Del. 2007).[7]

District of Columbia: The D.C. burglary statute only prohibited "enter[ing]" premises "with intent to" commit a crime. D.C. Code § 22-1801 (1981). "Under

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lawful or unlawful entry." Ibid.; see also 1999 Colo. Sess. Laws 326, 327. While the prior statute required proof that the defendant intended to commit a crime "at the moment he first became a trespasser," the present-day provisions encompass those who form their intent later. *Bondurant*, 296 P.3d at 214 (quoting *Cooper*, 973 P.2d at 1240).

[7] But cf. note 5, *supra*.

[D.C.'s] burglary statute, the government must prove beyond a reasonable doubt that the defendant entered the premises having already formed an intent to commit a crime therein." *Warrick* v. *United States*, 528 A.2d 438, 442 (D.C. 1987) (citation omitted).

Hawaii: Hawaii's statutes defined burglary as the intentional and unlawful entry or remaining in a building with intent to commit a crime against a person or property rights. Haw. Rev. Stat. §§ 708-810, 708-811 (1985). The Hawaii Supreme Court has held that "[i]t would be an unwarranted extension" of the statutes "to expand the offense of burglary to include situations in which the criminal intent develops *after* an unlawful entry or remaining has occurred." *State* v. *Mahoe*, 972 P.2d 287, 291 (Haw. 1998).

Idaho: Idaho's burglary statute, first adopted in 1972, prohibited any entry, whether or not it was unlawful, of certain premises with intent to commit any theft or felony. Idaho Code Ann. § 18-1401 (1987). The Idaho courts required the defendant to have formed the criminal intent by the time of entry. See *Matthews* v. *State*, 741 P.2d 370, 373 (Idaho Ct. App. 1987) (burglary requires that "defendant conceived of the crime before entering the premises"); *State* v. *Matthews*, 700 P.2d 104, 106 (Idaho Ct. App. 1985) ("Burglary * * * requires entry into a building with the intent, at that time, to commit theft or a felony.").

Illinois: Burglary applied to a person who "without authority, [k]nowingly enters or without authority remains within a building * * * with intent to commit therein a felony or theft." 720 Ill. Comp. Stat. Ann. 5/19-1(a) (West 1993); see also Public Act 82-238, 1981 Ill. Laws 1275, 1275-1276. "Entry" burglaries

required contemporaneous intent. *E.g.*, *People* v. *Tackett*, 414 N.E.2d 748, 749-750 (Ill. App. Ct. 1980). Although one intermediate appellate court suggested in dicta that "remains within" burglary did not require contemporaneous intent, see *People* v. *Boose*, 487 N.E.2d 1088, 1091 (Ill. App. Ct. 1985), the weight of case law was to the contrary at the time of ACCA's enactment. The Illinois Supreme Court had stated flatly, at a time when the burglary statute had entry and remaining variants, that "[a] criminal intent formulated after a lawful entry will not satisfy the statute." *People* v. *Wea[illegible]*, 243 N.E.2d 245, 248 (Ill. 1968). And the Court of A[illegible]eals characterized the "remaining in" variant as "aimed at a situation where a defendant lawfully enters a building and then conceals himself *with the intent to commit a felony*." *People* v. *Green*, 404 N.E.2d 930, 932 (Ill. App. Ct. 1980). In 2016, the Illinois Supreme Court confirmed that "burglary by remaining includes situations in which an individual enters a public building lawfully, but, *in order to commit a theft or felony*, (1) hides and waits for the building to close, (2) enters unauthorized areas within the building, or (3) continues to remain on the premises after his authority is explicitly revoked." *People* v. *Bradford*, 50 N.E.3d 1112, 1120 (Ill. 2016) (emphasis added) (citations omitted).[8]

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[8] In characterizing Illinois as lacking a contemporaneous intent requirement, see *Bernel-Aveja*, 844 F.3d at 236 n.125 (Owen, J., concurring), Judge Owen cited the dicta from *Boose*, a case where the "State chose to charge [only] * * * burglary by illegal entry," 487 N.E.2d at 1090. At the time of ACCA's enactment, Illinois courts also recognized a "limited authority" doctrine, under which authority to be present in a structure (*e.g.*, a store during business hours) was deemed revoked when a defendant formed the intent

Indiana: Only by breaking and entering "in conjunction with" an intention to commit a felony "at the moment of entry," could an individual be convicted of burglary. *Bonds* v. *State*, 436 N.E.2d 295, 297 (Ind. 1982); see also Ind. Code Ann. § 35-43-2-1 (LexisNexis 1985). Arguing, for example, that a defendant had "entered [a] trailer simply because he was * * * seeking shelter" could absolve him of a burglary conviction, though he subsequently committed a felony within the trailer. See *Garcia* v. *State*, 463 N.E.2d 1099, 1101 (Ind. 1984).

Louisiana: Louisiana's 1986 burglary statutes did not include any "remaining in" language; they only encompassed unauthorized entry. See La. Stat. Ann. §§ 14:60, 14:62 (1986). Courts required intent to be contemporaneous with unlawful entry. See *State* v. *Jones*, 426 So. 2d 1323, 1325 (La. 1983) ("The defendant must have had the specific intent to commit either a felony or a theft at the time of his unauthorized entry.").

Maine: Anyone who "enters or surreptitiously remains in a structure, knowing that he is not licensed or privileged to do so, with the intent to commit a crime therein," commits burglary. Me. Rev. Stat. Ann. tit. 17-A, § 401(1) (1983). It was "an essential element of burglary * * * that at the time defendant makes an unauthorized entry into a building defendant *must then* entertain actual intent to commit a specific crime" therein. *State* v. *Field*, 379 A.2d 393, 395 (Me. 1977)

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to commit a crime, on the theory that an owner only holds a building open for lawful purposes. *Weaver*, 243 N.E.2d at 248. That doctrine is consistent with a contemporaneous-intent requirement, since the moment of first unlawful remaining in a public space necessarily coincided with the defendant's formation of criminal intent.

(emphasis added). The statutory sentencing provision underscored that "remaining in" was a discrete time of initial unauthorized presence, not a continuous state: "[a] person may be convicted both of burglary and of the crime which he committed or attempted to commit *after* entering or *remaining in* the structure." Me. Rev. Stat. Ann. tit. 17-A, § 401(3) (1983) (emphases added).[9]

Maryland: Burglary required breaking and entering with contemporaneous intent to commit a crime. See *Reed* v. *State*, 560 A.2d 1104, 1106 (Md. 1989) ("burglary" requires intent to commit a crime "at the time of the breaking"). Breaking and entering absent intent was separately defined as a misdemeanor. Md. Code Ann. art. 27, §§ 29-31B (Michie 1982 & Supp. 1987).[10]

Massachusetts: Burglary statutes uniformly required entry with intent to commit a crime. Mass. Gen. Laws Ann. ch. 266, §§ 14, 15, 16, 16A, 17, 18 (West 1970). "In the lexicon of Massachusetts crimes there [was] no such crime as 'breaking and entering' unaccompanied by intent to commit a felony or a

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[9] In 1999, the Maine legislature codified a separate crime of "aggravated criminal trespass," applicable to any person who, without authority, "enters a dwelling place and * * * [w]hile in the dwelling place violates [certain] provision[s] of [the criminal laws]." Me. Rev. Stat. Ann. tit. 17-A, § 402-A (2005); see also 1999 Me. Laws 788. The contrast between this language and the burglary statute supports a contemporaneous-intent requirement for "remaining in" burglary.

[10] Modern-day Maryland burglary statutes require intent for first, second, and third-degree offenses. Md. Code Ann., Crim. Law §§ 6-202, 6-203, 6-204 (LexisNexis 2019). Fourth-degree burglary covers breaking and entering absent intent, presence on certain premises with criminal intent, and possession of burglar's tools. *Id.* § 6-205(a)-(d).

misdemeanor." *Commonwealth* v. *Vinnicombe*, 549 N.E.2d 1137, 1138 (Mass. App. Ct. 1990).[11]

Michigan: Separate provisions criminalized "break[ing] and enter[ing]" certain structures with intent to commit a felony or larceny therein, on the one hand, and "[e]ntering without breaking" those structures with the same intent, on the other; neither provision spoke to unlawful remaining. Mich. Comp. Laws §§ 750.110, 750.111 (1968). "[W]hoever [entered]" must have "entertained *at the time* a felonious intent." *People* v. *Barron*, 163 N.W.2d 219, 221 (Mich. 1968) (emphasis added).[12]

Minnesota: Anyone who "enter[ed] a building without consent and with intent to commit a crime," Minn. Stat. § 609.582 (Supp. 1983), committed burglary. The statute defined "enters without consent" to include "remain[ing] within a building without the consent of the person in lawful possession," *id.* § 609.581, subd. 4(c). "[I]t is necessary that the defendant had the intent to commit that crime at the time that the defendant either entered or remained in the building. Whether the defendant intended to commit the crime must be determined from all the circumstances, including, the manner and time of entry or remaining in the building." *State* v. *Hanson*, No. A06-567, 2007 WL 2177334, at *3 (Minn. Ct. App. July 31, 2007) (citation omitted); cf. *State* v. *Nelson*, 523 N.W.2d 667, 669-670 (Minn. Ct.

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[11] In 1998, the Massachusetts legislature enacted a new provision criminalizing entering "by false pretenses," including entering by such and committing a larceny, without specifically requiring the intent to commit that larceny exist at the time of entry. 1998 Mass. Acts 1376 (codified at Mass. Gen. Laws ch. 266, § 18A (2017)).

[12] For legislative changes in Michigan, see pp. 9-10, *supra*.

App. 1994) (treating "remain[ing] within a building" as fixed point in time rather than continuous state, for purposes of deciding degree of burglary).[13]

Mississippi: Mississippi's 1986 burglary statutes criminalized breaking and entering with intent to commit a crime. See Miss. Code. Ann. §§ 97-17-19, 97-17-21, 97-17-23, 97-17-27, 97-17-29, 97-17-33, 97-17-37 (1994). Mississippi courts have held that intent must be concurrent with unlawful entry. See, *e.g.*, *Davis* v. *State*, 611 So. 2d 906, 911 (Miss. 1992) (holding that at the moment of unlawful entry, "it is necessary * * * to show * * * inten[t] to commit a crime therein"); *Harper* v. *State*, 478 So. 2d 1017, 1021 (Miss. 1985) (same).

Missouri: Missouri's burglary statutes criminalized "knowingly enter[ing] unlawfully or knowingly remain[ing] unlawfully in a building * * * for the purpose of committing an offense therein." Mo. Rev. Stat. §§ 569.160.1, 569.170.1 (West 1979). That the legislature specified that "remaining" must be "for the *purpose* of committing an offense therein," *ibid.* (emphasis added)—in other words, must be with the "conscious object to" commit a crime, *id.* § 562.016.2—suggests that the intent to commit a crime must be the catalyst for the decision to remain, rather than a byproduct of opportunity. That reading is confirmed by the legislative committee comments to the 1973 proposed code, which emphasized that "[t]he essence of burglary has traditionally been an unauthorized intrusion *plus a purpose to commit some type of crime*"; while "the Committee decided to replace the concept of 'breaking' with

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[13] Minnesota later expanded its burglary statute to prohibit "enter[ing] a building without consent and commit[ting] a crime" therein. 1988 Minn. Laws 1649, 1654.

that of 'entering or remaining unlawfully,'" it gave no indication of abandoning the traditional element that intent must accompany the unauthorized intrusion.[14] Mo. Ann. Stat. § 569.170, Comment to 1973 Proposed Code (West 1979) (emphasis added).

Montana: Montana's 1986 burglary statute required that the defendant have unlawfully entered or remained in an occupied structure "with the purpose to commit an offense therein." Mont. Code Ann. § 45-6-204 (1987). Several Montana Supreme Court decisions indicate that intent was required at the moment of unlawful entry or first unlawful remaining in. See, *e.g.*, *State* v. *Courville*, 769 P.2d 44, 47-48 (Mont. 1989); *State* v. *Manthie*, 641 P.2d 454, 456 (Mont. 1982).[15]

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[14] Though Judge Owen cites a stray remark from the Missouri Court of Appeals (postdating ACCA) to reach a different conclusion, see *Bernel-Aveja*, 844 F.3d at 235 & n.130 (Owen, J., concurring) (citing *State* v. *Rollins*, 882 S.W.2d 314, 317-318 (1994)), the reliance is unwarranted. *Rollins* never discussed the intent to commit a crime; the quoted language appears in the context of the court's rejection of the contention that without "evidence that [the] victim unequivocally withdrew any license to remain," the prosecution could not show that the defendant knowingly remained unlawfully. 882 S.W.2d at 317.

[15] In 2009, the Montana legislature amended the burglary statute to expand the definition of burglary to include situations in which a defendant knowingly "enters or remains unlawfully in an occupied structure" and commits an offense in that structure. See Mont. Code Ann. § 45-6-204(1)(b) (2017); see also *State* v. *Tellegen*, 314 P.3d 902, 906 (Mont. 2013) ("burglary is committed when a person unlawfully enters a structure and commits an offense therein"). That the Montana legislature felt the need to amend the statute in this manner bolsters the conclusion that Montana law *did* require contemporaneous intent before 2009.

Nebraska: Since 1977, Nebraska's burglary statute has required that the prosecution establish the defendant intended to commit an enumerated crime "*when* he broke and entered." *United States* v. *Richards*, No. 13-cr-371, 2014 WL 6686783, at *11 (D. Neb. Nov. 26, 2014) (emphasis added) (citing *State* v. *Burdette*, 611 N.W.2d 615, 629 (Neb. 2000)); see Neb. Rev. Stat. § 28-507 (1985).

Nevada: In 1986, Nevada law defined burglary as any entry "with intent to commit grand or petit larceny, or any felony." Nev. Rev. Stat. Ann. § 205.060(1) (Michie 1986). It did not provide for a crime of burglary based on unlawful remaining. And it required that the defendant possess the requisite intent at the time of entry. *State* v. *Adams*, 581 P.2d 868, 869 (Nev. 1978) ("A criminal intent formulated after * * * entry will not satisfy the statute.").

New Hampshire: New Hampshire's burglary statute required unprivileged entry into a building with contemporaneous criminal intent. N.H. Rev. Stat. Ann. § 635:1 (Supp. 1986); see also *State* v. *Reardon*, 431 A.2d 796, 798 (N.H. 1981) (per curiam) (intent "at the time he entered"). Unlicensed or unprivileged entering or remaining, absent criminal intent, was classified separately in § 635:2 as criminal trespass.[16]

New Jersey: In 1986, a person was guilty of burglary if "with purpose to commit an offense therein he: (1) [e]nters * * * or (2) [s]urreptitiously remains" in a

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[16] In 2014, the burglary statute was amended to include entering or remaining unlawfully with the purpose to commit a crime. 2014 N.H. Laws 171, 173. The criminal trespass provision still separately addresses unlawfully entering or remaining without intent. N.H. Rev. Stat. Ann. § 635:2 (LexisNexis 2018).

structure without authorization. N.J. Stat. Ann. § 2C:18-2(a) (West 1982). New Jersey courts interpreted both variants as requiring contemporaneous intent. *E.g.*, *State* v. *Pyron*, 495 A.2d 467, 468 (N.J. Super. Ct. App. Div. 1985) ("An essential element of N.J.S.A. 2C:18-2(a)(1) burglary is unlawfully entering a structure for the purpose of committing an offense once inside."). *State* v. *Nieves*, A-2010-11T4, 2014 WL 886810, at *3 (N.J. Super. Ct. App. Div. Mar. 7, 2014), held that "a conviction for burglary requires proof that the defendant has an ulterior purpose or objective—committing 'an offense therein'—when the defendant engages in the proscribed conduct," *i.e.*, when he "enters or surreptitiously remains in a structure." "The temporal congruence of the proscribed conduct and the purpose to commit a crime in the structure is critical." *Ibid.*

New Mexico: New Mexico defined burglary as the "unauthorized entry" of a structure "with intent to commit any felony or theft therein." N.M. Stat. Ann. § 30-16-3 (Michie Supp. 1984); see also *State* v. *Jennings*, 691 P.2d 882, 885 (N.M. Ct. App. 1984) (burglary "requires an unauthorized entry with the intent to commit any felony or theft").

New York: New York's burglary statutes, which have not been amended since 1981, apply to anyone who "knowingly enters or remains unlawfully in a [building or dwelling] with intent to commit a crime therein." N.Y. Penal Law §§ 140.20-140.30 (McKinney 2019). The New York Court of Appeals has held that "contemporaneous intent is required" under both the "entry" and "remaining" prongs of the statutes. *People* v. *Gaines*, 546 N.E.2d 913, 915-916 (N.Y. 1989).

North Carolina: North Carolina's principal burglary statute, N.C. Gen. Stat. § 14-51 (1993), required proof of contemporaneous intent. See, *e.g.*, *State* v. *Peacock*, 330 S.E.2d 190, 193 (N.C. 1985) ("A breaking or entering into a building without the intent to commit a felony is not converted into burglary by the subsequent commission therein of a felony subsequently conceived." (citation omitted)).

North Dakota: Since 1973, North Dakota's burglary statute has criminalized "willfully enter[ing] or surreptitiously remain[ing] in a building or occupied structure * * * , when at the time the premises are not open to the public and the actor is not licensed, invited or otherwise privileged to enter or remain * * * , with intent to commit a crime therein." N.D. Cent. Code § 12.1-22-02(1) (2012). Although North Dakota courts have not addressed the contemporaneous-intent issue with respect to the "surreptitiously remain[ing]" prong, see *Bernel-Aveja*, 844 F.3d at 240 (Owen, J., concurring), they have made clear that defendants charged with unlawful entry must have intended to commit a crime at the time of the entry, see *State* v. *One 1990 Chevrolet Pickup*, 523 N.W.2d 389, 395 (N.D. 1994) (no burglary if defendant committed theft after entering home "only out of curiosity and without intent to steal"); *State* v. *Arne*, 311 N.W.2d 186, 189 (N.D. 1981) (emphasizing in affirming burglary conviction that "[t]here was an intent to commit the crime at the time the building was entered").

Oklahoma: The burglary statutes prohibited only "break[ing]" and "enter[ing]" with criminal intent and made no mention of "remaining in." Okla. Stat. Ann. tit. 21, §§ 1431, 1435 (West 1983). Oklahoma courts confirmed that a defendant must "have the requisite

criminal intent at the time of unlawful entry." *Worchester* v. *State*, 536 P.2d 995, 998 (Okla. Crim. App. 1975).

Pennsylvania: Burglary required unlicensed or unprivileged entrance with the intent to commit a crime. 18 Pa. Stat. and Cons. Ann. § 3502 (West 1983). It was clear by 1986 that "to be convicted of burglary, the defendant must have formed the intent to commit a crime when he entered * * * , not after he entered." *Commonwealth* v. *Russell*, 460 A.2d 316, 321 (Pa. Super. Ct. 1983); see also *Commonwealth* v. *Gonzales*, 443 A.2d 301, 304 (Pa. Super. Ct. 1982) (burglary requires "contemporaneous intent * * * of committing a crime" at time of entry).

Rhode Island: "In Rhode Island the burglary statute, § 11-8-1, incorporate[d] the common-law definition of that crime," which requires breaking and entering with intent to commit a crime. *State* v. *O'Rourke*, 399 A.2d 1237, 1238 (R.I. 1979); see also 11 R.I. Gen. Laws § 11-8-1 (1981). Deviations from the common-law crime were separately codified, including provisions criminalizing the mere act of "breaking and entering," without either intent to commit another crime or subsequent commission of another crime. *E.g.*, 11 R.I. Gen. Laws §§ 11-8-2, 11-8-5.1 (1981).

South Carolina: South Carolina's 1986 burglary statutes required "enter[ing]" a dwelling or building "with intent to commit a crime" therein. S.C. Code Ann. §§ 16-11-311, 16-11-312, 16-11-313 (2003); 1985 S.C. Acts 604-605. South Carolina courts have consistently required that intent be concurrent with entry. See, *e.g.*, *State* v. *Howard*, 42 S.E. 173, 175 (S.C. 1902) ("[T]o justify a [burglary] conviction * * * , the jury

ought to be satisfied by the evidence, beyond a reasonable doubt, that the intent to rob existed when the house was entered, not formed afterward" (citation omitted)); *State* v. *Gilliland*, 741 S.E.2d 521, 526 (S.C. Ct. App. 2012) ("[T]he intent to commit a crime must exist at the time the accused enters.").

Tennessee: In 1986, Tennessee's burglary statutes required proof of "breaking and entering" with the "intent to commit a felony." Tenn. Code Ann. §§ 39-3-401(a), 39-3-403(a), 39-3-404(a)(1) (1982 & Supp. 1986).[17]

Vermont: In 1986, Vermont's burglary statute provided that a "person is guilty of burglary if he enters any building or structure * * * with the intent to commit" a listed crime. Vt. Stat. Ann. tit. 13, § 1201 (1989).[18]

Virginia: Virginia's burglary statutes required entry with contemporaneous intent to commit a crime. See Va. Code Ann. §§ 18.2-89, 18.2-90, 18.2-91, 18.2-92 (1988); see also *Jones* v. *Commonwealth*, 687 S.E.2d

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[17] As part of a general revision of its criminal code, Tennessee amended and consolidated its burglary laws in 1989. See 1989 Tenn. Pub. Acts 1223 (codified as amended at Tenn. Code Ann. § 39-14-402).

[18] Vermont's burglary statute does "not apply to a licensed or privileged entry, or to an entry that takes place while the premises are open to the public, unless the person, with the intent to commit a crime specified in this subsection, surreptitiously remains" inside after the license expires or the premises are closed. Vt. Stat. Ann. tit. 13, § 1201 (1989). Regardless, the statute required criminal intent at the time of entry. See *Bernel-Aveja*, 844 F.3d at 237-238 (Owen, J., concurring) (materially identical contemporary Vermont statute "provides that intent to commit a crime on the premises must be present at the time of unlawful entry or at the time of lawful entry").

738, 740 (Va. 2010) ("To sustain the statutory burglary conviction the Commonwealth was required to prove that at the time [the defendant] entered the apartment he intended to commit an assault and battery."); *Scott* v. *Commonwealth*, 323 S.E.2d 572, 574-575 & n.1 (Va. 1984) (similar).

West Virginia: West Virginia limited burglary to "enter[ing] * * * with intent to commit a felony or any larceny therein." W. Va. Code Ann. § 61-3-11 (1984). Criminal intent must be contemporaneous with entry. *State* v. *McCormick*, 277 S.E.2d 629 (W. Va. 1981) (per curiam), is instructive. There, the court concluded that in a prosecution under a closely related breaking-and-entering law (see W. Va. Code Ann. § 61-3-12 (1991)), it was reversible error to "t[ell] the jury that if they believed * * * the defendant broke and entered * * * and committed a larceny therein, then he is presumed to have entered with the intent to commit larceny." 277 S.E.2d at 631-632.

Wisconsin: Burglary applied to those who "intentionally enter[ed]" certain structures without consent "and with intent to steal or commit a felony in such place." Wis. Stat. § 943.10 (1982). "[E]ntry" was defined to "include[] the idea of presence within" a building. *Levesque* v. *State*, 217 N.W.2d 317, 318 (Wis. 1974). But to constitute burglary, "[c]on-currently with the entry [the defendant] must have the intention to steal or commit a felony." *Id.* at 319. For instance, where a defendant claimed "he entered [a] tavern during open hours, drank too much and passed out in the men's room, and then, after awakening while the tavern was closed, he formed the intent to steal," the Court of Appeals held that "if he did not form the requisite intent to steal until he awoke inside the tavern,

the offense of theft, not burglary, was committed because the intent to steal was not formed prior to or at the time of entry." *State* v. *Cosby*, 321 N.W.2d 365 (Wis. Ct. App. 1982) (unpub.).[19]

States Lacking A Contemporaneous-Intent Requirement

Alabama: The Alabama Court of Criminal Appeals interpreted Alabama's burglary statutes, Ala. Code §§ 13A-7-5, 13A-7-6, 13A-7-7 (LexisNexis 1994), as encompassing cases where "the intent to commit a crime" is "formed after the entry and while the accused remains unlawfully." *Gratton* v. *State*, 456 So. 2d 865, 872 (Ala. Crim. App. 1984).

Arizona: In 1986, Arizona defined burglary as "entering or remaining unlawfully in or on" a structure "with the intent to commit any theft or any felony therein." Ariz. Rev. Stat. Ann. §§ 13-1506, 13-1507, 13-1508 (1989). The Arizona courts held that the statutes did not require proof of contemporaneous intent. See *State* v. *Embree*, 633 P.2d 1057, 1059 (Ariz. Ct. App. 1981); see also *State* v. *Belcher*, 776 P.2d 811, 812 (Ariz. Ct. App. 1989).

Florida: Florida's 1986 definition of burglary penalized unlicensed "entering or remaining * * * with the intent to commit an offense." Fla. Stat. § 810.02 (West 1994). Florida courts do not appear to have squarely addressed the contemporaneous-intent issue at the time of ACCA's enactment. They did recognize that even where a victim had initially consented to the

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[19] Cf. *Champlin* v. *State*, 267 N.W.2d 295, 299 (Wis. 1978) (reversing burglary conviction where defendant entered with intent to steal from hotel lobby that was open to the public; rejecting state's broad reading of "dicta" from *Levesque*).

defendant's presence in a building, the victim's resisting the defendant's assault "ma[de] his remaining in the premises after the withdrawal [of consent] a burglary." *Ray* v. *State*, 522 So. 2d 963, 966-967 (Fla. Dist. Ct. App. 1988), abrogated in part by *Delgado* v. *State*, 776 So. 2d 233 (Fla. 2000). Courts later indicated intent could occur after the time of first unlawful remaining. *Braddy* v. *State*, 111 So. 3d 810, 844 (Fla. 2012) (per curiam).

Georgia: Burglary covered a defendant who unlawfully "enters or remains" with requisite intent. Ga. Code Ann. § 16-7-1 (1988). Georgia courts have held that intent does not need to be concurrent with unlawful entry. See, *e.g.*, *Hewatt* v. *State*, 455 S.E.2d 104, 106 (Ga. Ct. App. 1995); *Keith* v. *State*, 225 S.E.2d 719, 720 (Ga. Ct. App. 1976).

Iowa: Iowa's prohibition on unlawfully "remain[ing]" within "an occupied structure" with intent to commit a crime, Iowa Code § 713.1 (1979), was thought by leading commentators to allow for formation of such intent after the initial moment of unlawful presence, see John L. Yeager & Ronald L. Carson, 4 Iowa Practice, *Criminal Law & Procedure* § 294 (1979), and the state's Supreme Court later adopted that understanding, *State* v. *Dible*, 538 N.W.2d 267, 271 (Iowa 1995).

Kansas: Burglary occurred when a person "knowingly and without authority enter[ed] into or remain[ed] within" a building "with intent to commit a felony" therein, Kan. Stat. Ann. § 21-3715 (1981), whether the intent was formed before or after the unlawful entry or initial moment of unlawful presence, *State* v. *Mogenson*, 701 P.2d 1339, 1343-1345 (Kan. Ct.

App. 1985); accord *State* v. *Gutierrez*, 172 P.3d 18, 23 (Kan. 2007).

South Dakota: South Dakota's burglary statute covered both unlawfully "enter[ing]" and "remain[ing] in an occupied structure," "with intent to commit any crime" therein. S.D. Codified Laws §§ 22-32-1, 22-32-3 (1988); 1976 S.D. Sess. Laws ch. 158 §§ 32-1, 32-2, at 273-274. The South Dakota Supreme Court has stated that the burglary statute is satisfied if "the person remain[s] in the structure after forming the intent to commit a crime." *State* v. *DeNoyer*, 541 N.W.2d 725, 732 (S.D. 1995).

Texas: The 1986 burglary statute encompassed not just entry with intent to commit a felony or theft, but also "remain[ing] concealed, with intent to commit a felony," Tex. Penal Code Ann. § 30.02(a)(2) (West 1974), and it eschewed the intent requirement altogether for anyone who enters a building "and commits or attempts to commit a felony or theft," *id.* § 30.02(a)(3). Thus, when a defendant did have intent to commit a felony, it did not need to be concurrent with entry. See *Day* v. *State*, 532 S.W.2d 302, 305-306 (Tex. Crim. App. 1976) (no intent required for § 30.02(a)(3)); *Espinoza* v. *State*, 955 S.W.2d 108, 111 (Tex. App. 1997) (similar).

Washington: Washington's burglary statute applied to one who, "with intent to commit a crime against a person or property therein, * * * enters or remains unlawfully in a [covered structure]." Wash. Rev. Code. Ann. §§ 9A.52.020, 9A.52.030 (West 1988). The Washington Court of Appeals first addressed the issue of contemporaneous intent in 2005, holding that unlawful remaining is a continuous status, not a

discrete event; thus, a defendant can develop the requisite intent at any point while unlawfully present in a building. *State* v. *Allen*, 110 P.3d 849, 853-854 (Wash. Ct. App. 2005).

States With Ambiguous Laws

Kentucky: Burglary applied to a person who "with the intent to commit a crime, * * * knowingly enters or remains unlawfully in a building." Ky. Rev. Stat. Ann. § 511.020 (LexisNexis 1984). Consistent with retaining a contemporaneous-intent requirement, in 1986, the Supreme Court of Kentucky held, in vacating a burglary conviction, that even where a defendant "knowingly entered and unlawfully remained in the victim's apartment," if "he had no intent to commit a crime when he entered the room," he would be "guilty of criminal trespass only." *McClellan* v. *Commonwealth*, 715 S.W.2d 464, 466-467 (Ky. 1986).[20]

Ohio: In 1986, it would have been unclear to Congress whether Ohio required contemporaneous intent. Burglary was defined to mean that "[n]o person by force, stealth or deception, shall trespass in an occupied structure * * * with purpose to commit therein any [covered offense]." Ohio Rev. Code Ann. § 2911.12 (West 1985). As of 1986, state appellate courts had diverged on whether "the intent with which a person forcibly trespasses in an occupied structure is that which he had in mind at the time of the entry, not one which

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[20] In 1993, the Supreme Court of Kentucky held that a defendant who unlawfully entered a dwelling could "subsequently form[] the intent necessary to be guilty of the crime of burglary." *McCarthy* v. *Commonwealth*, 867 S.W.2d 469, 471 (Ky. 1993), abrogated on other grounds by *Lawson* v. *Commonwealth*, 53 S.W.3d 534 (Ky. 2001).

he may have formed later," *State* v. *Flowers*, 475 N.E.2d 790, 792 (Ohio Ct. App. 1984), or whether "the 'purpose to commit a felony' element * * * may legally be formed while the trespass is in progress," *State* v. *Jones*, 440 N.E.2d 580, 581 (Ohio Ct. App. 1981).[21]

Oregon: Burglary applied to anyone who "enters or remains unlawfully in a building with intent to commit a crime therein." Or. Rev. Stat. Ann. §§ 164.215, 164.225 (West 1987). Although a single decision of the Oregon Court of Appeals appeared to suggest that contemporaneous intent was not required, *State* v. *Papineau*, 630 P.2d 904, 907 (Or. App. Ct. 1981), that court later clarified that "the proper focus is on the defendant's intent at the initiation of the trespass," *In re J.N.S.*, 308 P.3d 1112, 1118 (Or. Ct. App. 2013); see also *ibid.* (reading *Papineau* as not eliminating requirement of contemporaneous intent, and stating that, insofar as *Papineau* "can be read to suggest that a person can be convicted of burglary for unlawfully entering a building and thereafter forming intent to commit a crime therein," that suggestion was inconsistent with the Oregon Supreme Court's subsequent interpretation of the burglary statute). The Oregon Supreme Court has not directly addressed the question, but the Court of Appeals recently reaffirmed that the state's burglary statute, which remains substantially the same as in 1986, requires that the defendant have formed the requisite criminal intent at the moment of unlawful entry or first unlawful remaining.

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[21] Not until 2000 would the Ohio Supreme Court clarify, in *State* v. *Fontes*, 721 N.E.2d 1037, 1040 (Ohio 2000), that the Ohio burglary statute's use of the term "trespass" refers to a continual act, allowing intent to be formed at any time while trespassing.

See *State* v. *McKnight*, 426 P.3d 669, 673 (Or. Ct. App. 2018).

Utah: Utah's burglary statute, enacted in 1973, proscribed entering or remaining unlawfully in any building or portion thereof with intent to commit a felony, theft, or assault. Utah Code Ann. § 76-6-202 (LexisNexis 1990). As of 1986, the Utah courts had not addressed whether contemporaneous intent was required under the statute.[22]

Wyoming: Wyoming defined burglary as entering or remaining in certain structures with intent to commit theft or a felony therein. Wyo. Stat. Ann. § 6-3-301 (LexisNexis 1986). But as of 1986, the Wyoming courts had not addressed when the defendant must have formed the criminal intent. See *Bernel-Aveja*, 844 F.3d at 240 (Owen, J., concurring) (noting that it is "unclear" what Wyoming's burglary statute "require[s] regarding the timing of intent because the state courts have not yet addressed the question").

III. A CONTEMPORANEOUS-INTENT REQUIREMENT SERVES CONGRESS'S PURPOSE OF RESERVING ENHANCED PENALTIES FOR DANGEROUS CAREER CRIMINALS

Recognizing a contemporaneous-intent requirement would be consistent with ACCA's purpose of imposing enhanced penalties on "a small number" of dangerous career criminals. *Taylor*, 495 U.S. at 583. By

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[22] Noting that the issue was "one of first impression," the Utah Supreme Court in 1998 held that contemporaneous intent is not required, as a defendant's continued unlawful presence in a structure satisfies the unlawful remaining element of burglary. See *State* v. *Rudolph*, 970 P.2d 1221, 1228-1229 (Utah 1998).

contrast, it would conflict with Congress's objectives to inflict ACCA's harsh mandatory minimum on individuals with prior convictions for committing unplanned crimes of opportunity while trespassing.

Congress's use of the word "career" in the title of the "Armed *Career* Criminal Act" is meaningful. See *Begay*, 553 U.S. at 146 (ACCA's title "not merely decorative" (citation omitted)). As *Taylor* explained after extensively reviewing ACCA's legislative history, "Congress focused its efforts on career offenders—those who commit a large number of fairly serious crimes *as their means of livelihood*, and who, because they possess weapons, present at least a potential threat of harm to persons." 495 U.S. at 587-588 (emphasis added).

Individuals who commit spur-of-the-moment crimes of opportunity during a trespass do not fit that description. Given the absence of advance planning, it cannot reasonably be said that such individuals "make a full-time career" out of burglary. *Taylor*, 495 U.S. at 584 (quoting Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcommittee on Crime of the House Committee on the Judiciary, 99th Cong., 2d Sess. 12 (1986) (statement of Rep. Wyden) (House Hearing)); see also House Hearing 26 (statement of Deputy Assistant Attorney General James Knapp) (describing burglary as "probably the No. 1 professional crime"). Nor are such spontaneous offenses likely to reflect a "profit motive" that could be deterred through enhanced penalties. *Taylor*, 495 U.S. at 585 (quoting House Hearing 38 (statement of Bruce Lyons, President-elect of National Association of Criminal Defense Lawyers)). To the contrary, the government would brand as an armed career criminal

a homeless person with a handful of convictions for stealing food or clothing after seeking shelter in unoccupied commercial buildings on cold winter nights. Cf. *Gaines*, 546 N.E.2d at 914.

Furthermore, individuals with prior convictions from committing crimes of opportunity while trespassing do not present the increased "threat of harm to persons" that ACCA seeks to address. *Taylor*, 495 U.S. at 587-588; see also *Begay*, 553 U.S. at 146 (ACCA "focuses upon the special danger created when a particular type of offender * * * possesses a gun"). "Congress singled out burglary * * * because of its inherent potential for harm to persons." *Taylor*, 495 U.S. at 588; see also H.R. Rep. No. 849, 99th Cong., 2d Sess. 3 (1986) ("The Subcommittee agreed to add the crimes * * * that involve conduct that presents a serious potential risk of physical injury to others * * * such as burglary."). *Taylor* recognized that contemporaneous intent is closely tied to the risk of violence because "[t]he fact that an offender enters a building *to commit a crime* often creates the possibility of a violent confrontation between the offender and an occupant." 495 U.S. at 588 (emphasis added). An offender with contemporaneous intent generally acts with some amount of premeditation, increasing the likelihood that he will be "prepared to use violence if necessary to carry out his plans or to escape." *Ibid.*

Therefore, an individual with a history of carrying out pre-planned burglaries is more likely to be the type of dangerous offender at which ACCA is aimed—*i.e.*, the kind of person likely to "use [a] gun deliberately to harm a victim." *Begay*, 553 U.S. at 145. But the same cannot reasonably be said of the homeless person who commits a crime of opportunity after entering an

unoccupied building for no other reason than to escape from the cold. That is not "purposeful, violent, and aggressive" conduct indicating that "the offender is the kind of person who might deliberately point the gun and pull the trigger." *Id.* at 145-146; see also *Herrold*, 883 F.3d at 534 ("Scenarios in which a defendant trespasses but does not intend to commit a crime must engender less risk of confrontation than ones in which he enters *just to commit a crime.*").

The entire rationale for defining burglary as a separate offense collapses if the crime sweeps as broadly as the government claims. As explained above, see pp. 21-22, *supra*, "burglary is by hypothesis an attempt to commit some other crime" and was used at common law because of the difficulty of punishing inchoate offenses. Model Penal Code § 221.1, commentary, pp. 62-63 (1980). Because modern criminal law has largely abandoned rigid limits on criminal attempt, burglary is only justifiable as an independent offense if it is limited to conduct that creates more danger than the underlying crime. The existence of criminal intent at the time of unlawful entry or initial unlawful remaining is a key factor that "creates the possibility of a violent confrontation." *Taylor*, 495 U.S. at 588; cf. Model Penal Code § 221.1, commentary, p. 63 (1980) ("[E]ntry into a home at night in order to commit a theft is surely a more aggravated offense than an attempted theft alone, because of the additional element of personal danger that attends such conduct.").

"The ultimate absurdity," according to the Model Penal Code's authors, would be a "provision * * * making it burglary to commit an offense 'in' a building, regardless of the lawfulness of the actor's entry or *the intent with which he entered.*" Model Penal Code

§ 221.1, commentary, p. 65 (1980) (emphasis added). Michigan's third-degree home invasion statute allows for such an "ultimate absurdity" because it does not require that criminal intent accompany the initial act of unlawful occupation. Instead, it merely requires the prosecution to establish that the defendant "commit[ted] a misdemeanor" while "present in" a dwelling entered "without permission." Mich. Comp. Laws § 750.110a(4)(a).

Accordingly, by counting Quarles's third-degree home invasion conviction as an ACCA predicate, the decision below pushes ACCA beyond its logical limits. The Sixth Circuit held that generic burglary "allows for the development of intent at any point" while a defendant unlawfully remains within a structure. Pet. App. 7a. Under that rule, a 15-year mandatory minimum could apply not only to the homeless person who sleeps in a warehouse and steals a coat on his way out, but also to the "teenagers who unlawfully enter a house only to party, and only later decide to" steal from the house, *United States* v. *Herrera-Montes*, 490 F.3d 390, 392 (5th Cir. 2007); the hiker who seeks shelter from the snow in an unoccupied cabin and then takes food; and the defendant who enters a neighbor's home for a glass of water after having been hired to mow her lawn, and then pockets jewelry sitting near the sink, cf. *State* v. *Wesemann*, No. 03C01-9407-CR-00260, 1995 WL 605442, at *1-2 (Tenn. Crim. App. Oct. 16, 1995). These defendants may perhaps be fairly punished as thieves. But their prior transgressions would not be proof that they are the individuals targeted by ACCA: potentially dangerous "career offenders * * * who commit * * * serious crimes as their means of livelihood." *Taylor*, 495 U.S. at 587.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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No. 17-778

In the Supreme Court of the United States

JAMAR ALONZO QUARLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether a state offense that criminalizes an intruder's unlawful continued presence in a dwelling after forming the intent to commit a crime has "the basic elements of unlawful * * * remaining in, a building or structure, with intent to commit a crime," *Taylor* v. *United States*, 495 U.S. 575, 599 (1990), thereby qualifying as "burglary" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii).

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 850 F.3d 836. A prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 634 Fed. Appx. 578.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 2017. A petition for rehearing was denied on June 28, 2017 (Pet. App. 9a-10a). On September 15, 2017, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including November 24, 2017, and the petition was filed on that date. The petition for a writ of certiorari was granted on January 11, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Michigan, petitioner was convicted on one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. He was sentenced to 204 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals vacated and remanded in light of *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), and the district court reimposed the same sentence. 634 Fed. Appx. 578, 579 (per curiam); Am. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-8a.

1. Shortly after he was paroled following a prison sentence for shooting another person, petitioner assaulted his girlfriend, Chasity Warren, and threatened to kill Warren's mother. Presentence Investigation Report (PSR) ¶¶ 8-9. Then, on August 24, 2013, he had a lengthy dispute with Warren, forced her to accompany him, and held her at gunpoint. PSR ¶¶ 7-15.

Petitioner was unable to drive that day because he was "messed up" on Xanax, so Warren was driving the two of them around. PSR ¶ 10. Petitioner became angry and verbally abusive toward Warren when the car ran out of gas. *Ibid.* Warren hailed a cab that took them to a gas station, where Warren locked herself in a bathroom. PSR ¶ 11. When Warren emerged, petitioner took her by the arm back to their car. *Ibid.*

Petitioner got behind the wheel and, after knocking the side mirror off a parked car, became angrier with Warren and "struck her in the face," causing "swelling below her left eye." PSR ¶ 12. Warren asked to leave

when petitioner stopped at a McDonald's, but petitioner physically prevented her from doing so. PSR ¶ 13.

Petitioner drove to his house, where he "continued to yell at [Warren] and refused to let her leave." PSR ¶ 14. At one point, petitioner pointed a handgun at Warren's head and asked, "You want to go to a wedding or a funeral?" *Ibid.* Petitioner "began yelling at her for seeing other men and [questioning] whether or not she loved him." *Ibid.* Warren eventually escaped and called 911. PSR ¶ 15.

Officers arrived at the scene and arrested petitioner, who had attempted to drive away. PSR ¶ 15. During a protective sweep of petitioner's house, officers found a loaded .45-caliber semiautomatic pistol. PSR ¶ 16. Later forensic examination confirmed that the DNA on the pistol's handgrip belonged to petitioner. PSR ¶ 18.

Further investigation revealed that Layassa Moore, petitioner's ex-girlfriend, had filed a police report alleging that petitioner had recently visited her home and demanded to see her children. PSR ¶¶ 19-21. When Moore began arguing with petitioner, he pulled a gun, pointed it at her, and told her not to argue with him as he proceeded upstairs into the home. PSR ¶ 21.

2. A federal grand jury charged petitioner with one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1), based on the August 24, 2013 incident. PSR ¶¶ 1-2. He pleaded guilty. PSR ¶ 4.

After examining petitioner's lengthy criminal record, see PSR ¶¶ 47-57, the Probation Office determined that petitioner qualified for sentencing under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). PSR ¶ 61. The ACCA provides that a person who violates Section 922(g) and "has three previous convictions" for "a violent felony or a serious drug offense"

shall be imprisoned for "not less than fifteen years." 18 U.S.C. 924(e)(1).

The ACCA defines a "violent felony" to include, among other things, any crime punishable by more than one year that "is burglary, arson, or extortion, involves use of explosives" (the enumerated offenses clause) "or otherwise involves conduct that presents a serious potential risk of physical injury to another" (the residual clause). 18 U.S.C. 924(e)(2)(B)(ii); see *Welch* v. *United States*, 136 S. Ct. 1257, 1261 (2016). The Probation Office found that three of petitioner's prior convictions qualify as violent felonies: (1) a 2002 Michigan conviction for third-degree home invasion; (2) a 2004 Michigan conviction for assault with a dangerous weapon, and (3) a 2008 Michigan conviction for assault with a dangerous weapon. PSR ¶¶ 40, 51, 54, 56. The Probation Office calculated petitioner's Sentencing Guidelines range at 188 to 235 months of imprisonment. PSR ¶¶ 40, 61, 103.

Petitioner objected, arguing that his 2002 home-invasion conviction did not qualify as a violent felony. See D. Ct. Doc. 29, at 5-20 (Jan. 21, 2015). The district court determined that the conviction qualified under the ACCA's residual clause, overruled the objection, and sentenced petitioner to 204 months of imprisonment to be followed by five years of supervised release. J.A. 55-77; see J.A. 74 (describing petitioner as "the paradigm picture for somebody" who "should fall within the" ACCA because "[f]irearms, a former girlfriend, and drugs and alcohol" were "a very dangerous mix for [him]").

3. Following this Court's decision in *Johnson*, which held that the residual clause is unconstitutionally vague, 135 S. Ct. at 2557, the court of appeals vacated petitioner's sentence and remanded for a determination of

whether the home-invasion conviction qualified as "burglary." 634 Fed. Appx. at 579.

Although the ACCA does not define "burglary," this Court in *Taylor* v. *United States*, 495 U.S. 575 (1990), construed the term in a "generic" manner to include "any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599. *Taylor* instructed courts to employ a "categorical approach" to determine whether a prior conviction satisfies that definition. *Id.* at 600; *e.g.*, *United States* v. *Stitt*, 139 S. Ct. 399, 405 (2018). Under that approach, courts examine the "statutory definition[]" of the crime of conviction in order to determine whether it necessarily reflects conduct that constitutes the "generic" form of burglary referenced in the ACCA. *Taylor*, 495 U.S. at 600. If the definition "substantially corresponds" to, or is narrower than, generic burglary as defined in *Taylor*, the prior offense categorically qualifies as a predicate conviction under the ACCA. *Id.* at 602.

The district court here determined that petitioner's home-invasion conviction qualifies as "burglary." J.A. 104. The court rejected petitioner's argument that the Michigan offense is broader than generic burglary because it "does not have as an element that the perpetrator ha[ve] the intent to commit an offense at the time of the entry or remaining in." D. Ct. Doc. 50, at 2 (May 4, 2016); see *id.* at 5 (arguing that "contemporaneous intent" is required). The relevant Michigan statute provides that a "person is guilty of home invasion in the third degree if the person" either "[b]reaks and enters a dwelling with intent to commit a misdemeanor in the dwelling"; "enters a dwelling without permission with

intent to commit a misdemeanor in the dwelling"; or "breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor." Mich. Comp. Laws Ann. § 750.110a(4)(a) (West Supp. 2001). The court explained that the Michigan statute defines a "specific-intent state crime," in that "the intent [must be formed] at the time of entry" or "while still remaining in an unprivileged access in the house or in the structure." J.A. 103. The court remarked, "I don't see how you could have a specific-intent crime committed while residing or remaining in an unprivileged entry status and not satisfy" *Taylor*'s definition. *Ibid.*

The district court accordingly reimposed the same 204-month term of imprisonment. J.A. 104, 111. The court cited petitioner's history of "visit[ing] violence on people * * * close to him with guns while on supervision," which, the court observed, was "exactly the kind of danger that * * * we're meant to address when the ACCA applies." J.A. 111; see J.A. 110 (noting petitioner's "long list of trouble" and the "volatile mix of the drugs, the anger, the violence, and usually an ex-girlfriend, sometimes a present girlfriend").

4. The court of appeals affirmed, Pet. App. 1a-8a, rejecting petitioner's argument that generic burglary includes "an intent-at-entry element," under which the defendant must form the intent to commit a crime at the initial moment at which his presence becomes unlawful, rather than later while still unlawfully remaining, *id.* at 7a-8a. The court cited *Taylor*'s definition of generic burglary, which includes the "unlawful or unprivileged entry into, *or remaining in*, a building or other structure, with intent to commit a crime." *Id.* at 8a (quoting

Taylor, 495 U.S. at 598). The court explained that "someone who enters a building or structure and, while inside, commits or attempts to commit a felony will necessarily have remained inside the building or structure to do so." *Ibid.* (quoting *United States* v. *Priddy*, 808 F.3d 676, 685 (6th Cir. 2015)). The court accordingly reasoned that "generic burglary, as defined in *Taylor*, does not require intent at entry; rather the intent can be developed while 'remaining in.'" *Ibid.* (quoting *Taylor*, 495 U.S. at 598).

SUMMARY OF ARGUMENT

The court of appeals correctly determined that petitioner's home-invasion conviction qualifies as a conviction for generic "burglary" under the ACCA. Under *Taylor* v. *United States*, 495 U.S. 575 (1990), a state offense is generic burglary so long as it has the "basic elements" of an "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599. *Taylor*'s "contemporaneous-intent requirement" (Pet. Br. 2) is satisfied by a state offense that requires proof of the intruder's intent to commit a crime at any point while he is inside without permission. An intruder who develops a criminal intent while remaining is "remaining * * * with intent." *Taylor*, 495 U.S. at 599.

The word "remaining" unambiguously refers to the *entire* period of an intruder's unlawful presence, not just the first moment. Dictionary definitions of the word "remain" show that it refers to a continuous activity. And this Court has likewise recognized, in construing a federal criminal statute, that the word "permits no connotation other than continuing presence." *United States* v. *Cores*, 356 U.S. 405, 408 (1958). That comports with common usage: someone who calls in sick for the

day remains home sick for the entire day, not just at the moment he calls in sick.

Petitioner offers little to support his abnormal definition of the word "remaining" to encompass only the single moment in time at which a continued stay commences. His brief instead focuses almost exclusively on the undisputed requirement that the "remaining" and "intent" must *coincide in time*. The critical question here, however, is how long "remaining" *lasts*. To the extent that petitioner addresses the latter question, he largely conflates the two burglary variants, unlawful "remaining" and unlawful "entry," disregarding their linguistic and legal differences. Unlawful "entry" is essentially instantaneous and can occur without "remaining"; unlawful "remaining" is generally continuous and can occur without unlawful "entry."

When Congress made "burglary" an ACCA predicate in 1986, it intended to capture "the generic sense in which the term" was "used in the criminal codes of most States" at that time. *Taylor*, 495 U.S. at 598. And this Court has already held that the generic sense included "remaining * * * with intent." *Id.* at 599. At the time, 29 States prohibited "remaining in" burglary, and the text of each of those State's burglary statutes was naturally read to encompass situations where the intruder forms the requisite intent while remaining.

If Congress had delved deeper, the limited case law at the time reinforced that natural inference: five States' courts had concluded that an intruder could form the intent while remaining, two States' courts had reached ambiguous or conflicting decisions, and *no* State had definitively adopted petitioner's "initial moment" rule (nor had the relevant secondary sources suggested

such a rule). The weight of authority is similarly lopsided today: 18 States have explicitly adopted (by statute or judicial decision) a rule covering intent formed at any point, and only three have done otherwise (all by judicial decision). Congress in 1986 would not have intended to impose an arcane timing requirement that did not appear on the face of any state statute and was, at best, a rarity in the limited caselaw at the time (and is still a rarity today).

Doing so would have been particularly anomalous in light of the role that the explicit reference to "burglary" plays in the ACCA—identifying an invasive crime that presents a substantial risk of a violent encounter in an enclosed private space. See *Taylor*, 495 U.S. at 581, 588. That risk turns on the intruder's intent to commit a crime in someone else's home or other structure, not on whether he had that intent at the precise moment his unlawful presence began or developed it later while he remained. A resident or other victim who encounters the intruder will ordinarily not know—let alone care—about the timing or sequence by which the intruder developed the requisite intent. From the victim's perspective, what matters is that he or she has encountered a criminally-minded intruder. Petitioner attempts to paint a more benign picture of burglary by relying on a handful of hypothetical scenarios that largely focus on the *identity* of the burglar (which is also unlikely to be known to the victim) rather than the *time* at which the intruder formed the intent. Petitioner does not explain why intent at the moment of unlawful entry is categorically dangerous, but intent formed while unlawfully remaining is not.

Petitioner relies heavily on a survey—which occupies much of his brief (Br. 25-51)—showing that most

state burglary laws in 1986 required "contemporaneous intent." But that survey is misplaced. It is undisputed that generic burglary requires "contemporaneous intent." The question here is whether "remaining" lasts *only* for the initial moment that the intruder lacks permission to be there, or instead lasts the entire time he stays inside. Petitioner's survey does not answer that question. For example, the majority of his 37 supposedly favorable jurisdictions consists of 22 jurisdictions that prohibited only "entry" burglary, not "remaining in" burglary, and whose laws therefore do not illuminate how long "remaining" lasts. Petitioner also relies heavily on a handful of post-1986 decisions, which would not have been available when the relevant ACCA language was enacted, and overlooks post-1986 judicial decisions and legislative enactments that reject the minority "initial moment" rule.

More fundamentally, sifting through state court decisions defining the exact contours of "remaining" is misplaced. The list of ACCA predicates includes generic "burglary," which this Court has construed to encompass impermissibly remaining in a structure with intent. In doing so, the Court recognized that "exact formulations" of burglary "vary." *Taylor*, 495 U.S. at 598. And it understood Congress's "omission of a [statutory] definition of burglary" to "impl[y], at most, that Congress did not wish to specify an exact formulation," but instead gave that term a "generic meaning" with "basic elements" that a state offense could satisfy "regardless of its exact definition or label." *Id.* at 598-599. No reason exists to muddle the plain language of that "generic" definition with arcane and counterintuitive distinctions about "remaining" that Congress would not have contemplated when it used the term "burglary" to

describe a somewhat variegated, but thematically coherent, set of laws. Congress's use of the term "burglary" was intended to simplify, not complicate and proliferate, ACCA litigation.

ARGUMENT

FORMING THE INTENT TO COMMIT A CRIME WHILE UNLAWFULLY REMAINING INSIDE A BUILDING OR STRUCTURE QUALIFIES AS ACCA "BURGLARY"

In *Taylor* v. *United States*, 495 U.S. 575 (1990), this Court defined "burglary" under the ACCA as "any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599. That definition unambiguously encompasses the conduct of an intruder who impermissibly trespasses in a dwelling and while inside forms the intent to commit a crime: such a person "remain[s] * * * with intent," *ibid.*

In arguing otherwise, petitioner primarily focuses on the requirement that the intent be contemporaneous with the "remaining." But that point is undisputed—and his focus elides the crucial point: an intruder remains in a place the whole time he stays there, so the contemporaneousness requirement is satisfied when the intruder forms his intent *while* inside. To the extent petitioner even addresses how long "remaining" lasts, he proposes (Br. 2) to limit the phrase "remaining in" to "the initial moment when the privilege to be in lawfully entered premises ceases." But that limitation is at odds with the plain language of *Taylor*, was effectively unknown to the law at the time of the ACCA's enactment, and would be detrimental to the ACCA's scheme for identifying potentially violent recidivists. As it did earlier this Term in *United States* v. *Stitt*, 139 S. Ct. 399

(2018), the Court should reject such a hairsplitting limitation on generic burglary—which, if countenanced, would invite even more litigation—and reaffirm that *Taylor* meant what it said.

A. An Intruder Who Decides To Commit A Crime While Remaining In A Dwelling Is "Remaining With Intent"

Petitioner was convicted of "burglary" within the meaning of the ACCA, because that term includes a conviction under a state burglary law that can apply when an intruder forms the requisite intent while unlawfully remaining inside a dwelling. Such an offense "substantially corresponds" to, or is narrower than, *Taylor*'s "generic" conception of burglary, 495 U.S. at 602, because such a person "remain[s] in, a building or structure, with intent to commit a crime," *id.* at 599.

1. The plain meaning of "remaining" refers to continuous, not instantaneous, activity

Taylor's definition of burglary includes not only "unlawful or unprivileged entry into," but also "*remaining in*, a building or structure, with intent to commit a crime." 495 U.S. at 599 (emphasis added). After an intruder enters a dwelling, he remains inside until he leaves, not merely for an instant when he first decides to stay. An intruder who develops the intent to commit a crime while unlawfully present is thus committing generic burglary by unlawfully "remaining in, a building or structure, with intent to commit a crime." *Ibid.*

a. It is common ground between the parties (*e.g.*, Pet. Br. 2-4) that burglary under *Taylor* requires "contemporaneous intent," *i.e.*, that the intruder must have criminal intent at the same time he enters or remains inside the building or other structure. The act of "en-

try" is accomplished all at once, and accordingly the intruder must possess the requisite intent at that time if a burglary conviction rests on the unlawful entry. The ordinary meaning of "remaining" somewhere, by contrast, refers to the *continuous* activity of staying there. For a burglary conviction predicated on unlawful remaining, therefore, the contemporaneousness requirement is satisfied if the intent is formed at any time while the intruder remains inside.

The standard dictionary definition of the word "remain" means an ongoing action or state of staying in a particular place. See, *e.g.*, 13 *Oxford English Dictionary* 578 (2d ed. 1989) ("To continue in the same place (or with the same person); to abide, stay"; "To continue to be"); *Webster's Third New International Dictionary* 1919 (2002) ("remain" means "still extant, present, or available"; "to stay in the same place or with the same person or group"; "to continue unchanged in form, condition, status, or quantity : continue to be."); see also *Webster's New International Dictionary* 2106 (2d ed. 1958) (similar). That universal definition reflects the word's common usage; it would be quite unusual to use the word "remaining" to refer to a single instant.

If a person stays home from work for a sick day, he remains at home the entire day—not just first thing in the morning when he calls in sick. Likewise, if a person is arrested and invokes his *Miranda* right to remain silent, he remains silent so long as he does not speak—not just for the first moment after demanding a lawyer. The standard meaning of "remaining" also does not change when an adjective is attached (*e.g.*, "unlawful or unprivileged * * * remaining," *Taylor*, 495 U.S. at 599). A sit-in, for example, can be described as "peaceful remaining" for as long as it continues to be non-violent.

And a condition can accompany the "remaining" even if it did not exist at the start (*e.g.*, "remaining * * * with intent," *ibid.*). If the worker who called in sick at 9 a.m. develops a cough at noon, his "remaining at home" lasts the whole day, and his "remaining at home with a cough" lasts the whole afternoon.

This Court has previously relied on the continuous nature of the word "remain" in interpreting federal criminal law. In *United States* v. *Cores*, 356 U.S. 405 (1958), the Court addressed a statute that proscribed an alien crewman's "affirmative act of willfully remaining" in the United States longer than permitted. *Id.* at 408; see 8 U.S.C. 1282(c) (1952) (penalizing "[a]ny alien crewman who willfully remains in the United States in excess of the number of days allowed"). The crewman in *Cores* landed in Philadelphia and was allowed to stay in the United States for 29 days, but he overstayed and later traveled to Connecticut, where he was charged. 356 U.S. at 406. The district court in Connecticut dismissed the indictment for improper venue, on the theory that the offense "was not a continuing crime" and had been completed in Philadelphia. *Ibid.* This Court, however, rejected the argument "that the offense is completed the moment the permit expires" such that "even if the alien remains thereafter, he no longer commits the offense." *Id.* at 408-409. The Court explained that "the crucial word 'remains' permits *no connotation other than continuing presence*." *Id.* at 408 (emphasis added). The Court found it "incongruous to say that while the alien 'willfully remains' on the 29th day when his permit expires, he no longer does so on the 30th, though still physically present in the country." *Id.* at 409. Although "remaining at the instant of expiration satisfies

the definition of the crime," the Court emphasized that "it does not exhaust it." *Ibid.*

The term "remains" also has its typical continuous meaning in the law of trespass, which the generic definition of burglary parallels in some respects. See 3 Charles E. Torcia, *Wharton's Criminal Law* § 332, at 302-303 (15th ed. 1995). It is a trespass to "enter[] land in the possession" of another or to "remain[] on land" without permission. Restatement (Second) of Torts § 158 (1965) (Restatement). Consistent with the ordinary meaning of "remain," the phrase "remain[] on the land" does not refer solely to the first instant at which a person remains without permission, but instead refers to "a continuing trespass for the entire time during which the actor wrongfully remains." *Id.* § 158 cmt. m; cf. 18 U.S.C. 1752(a)(1) (unlawful to "knowingly enter[] or remain[] in any restricted building or grounds" without authority). If a person called 911 upon encountering an intruder in her home, and the police asked whether the intruder remained inside, it would be inexplicable to say "no" if he was still there.

b. Petitioner's brief focuses almost exclusively on the undisputed contemporaneous-intent requirement (see Br. 2-4, 15-18, 25-51), largely failing to address the meaning of the word "remaining"—the issue that actually decides this case. He provides no dictionary definition of "remaining" at all. To the extent he engages with the issue, he simply attempts to conflate "entry into" and "remaining in," *Taylor*, 495 U.S. at 599, by exporting the momentary nature of the former to the latter. But pairing "entry" with "remaining" does not unnaturally transform "remaining" into a word that refers solely to the first moment at which a person stays, rather than to the entire period of time. Cf. *Graham Cnty.*

Soil & Water Conservation Dist. v. *United States ex rel. Wilson*, 559 U.S. 280, 288-289 (2010) (declining to apply rule of thumb that "a word may be known by the company it keeps" to a short disjunctive list of distinct words). If a person walks into a store at 4:30 p.m. and stays for an hour, and an employee is asked when the person entered and how long he remained, the obvious answer would be that he entered at 4:30 and remained until 5:30. And if the store had closed at 5:00, then his remaining would be unlawful or unprivileged for the last half hour—not just for an instant at 5:00 when the store closed.

Petitioner's contention (Br. 16) that an ordinary reading of "remaining" would "render *Taylor*'s 'unlawful entry' language superfluous" is flawed in multiple respects. As a threshold matter, it "makes the mistake of re· ding an opinion (in truth part of an opinion) like a statute." *United States* v. *Stitt*, 860 F.3d 854, 878 (6th Cir. 2017) (en banc) (Sutton, J., dissenting), rev'd, 139 S. Ct. 399 (2018). The Court in *Taylor* articulated a "generic" definition of "burglary," 495 U.S. at 598, that reflects "a compact version of standards found in many states' criminal codes," *Smith* v. *United States*, 877 F.3d 720, 725 (7th Cir. 2017), cert. denied, 139 S. Ct. 783, and 139 S. Ct. 784 (2019). It was not itself writing a statute. The generic definition applies "regardless of [the] exact definition or label" a State uses, and reaches state laws so long as they "substantially correspond" to that definition and have its "basic elements." *Taylor*, 495 U.S. at 599, 602. The antisurplusage canon of statutory construction therefore does not apply.

But even if it did, the ordinary meaning of "remaining" would not render "entry" superfluous. Petitioner errs in asserting that "every unlawful entry with intent

would become 'remaining in' with intent as soon as the perpetrator enters." Pet. Br. 16 (citation omitted). An "entry" for purposes of burglary law is ordinarily understood to occur "if," for example, "any part of the actor's person intruded, even momentarily, into the structure." 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13(b), at 467 (1986) (LaFave); see 4 William Blackstone, *Commentaries on the Laws of England* 227 (1769) (similar). The "entry" prong thus parallels the common law of trespass by imposing liability the instant the defendant unlawfully crosses into the structure, not after some period of delay, and liability attaches to the intrusion regardless of whether the intruder's entire body has entered. See Restatement §§ 158, 163; cf. *United States* v. *Jones*, 565 U.S. 400, 405 (2012) ("[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all.") (quoting *Entick* v. *Carrington*, 95 Eng. Rep. 807, 817 (K.B. 1765)) (brackets in original). Deleting "entry" and referring only to "remaining" would be incongruous and create ambiguity in situations where (1) the entry was only fleeting; (2) the perpetrator abandoned his criminal intent immediately after entering; or (3) his entire body was never actually inside the structure.

The offense conduct underlying petitioner's own home-invasion conviction illustrates the point. Petitioner was intoxicated and assaulted his ex-girlfriend, who had a restraining order against him, in a parking lot. PSR ¶ 51. "She ran to a group of people who took her inside their apartment" to protect her. *Ibid.* Petitioner then "attempted to climb through an open front window to get at [her]"; he "broke the screen to the window" so

that "one arm, his head, and his upper torso were inside the apartment"; and he grabbed a woman by the arm before the apartment's occupants pushed him away and closed the window. *Ibid.* Petitioner then "kicked the [front] door in and broke the lock," but the occupants managed to hold the door and petitioner fled when they called the police. *Ibid.*

Petitioner plainly intended to commit a crime (assault) at the time he unlawfully "ent[ered]" the apartment by breaking the screen and reaching in through the window. But it is far from clear that he "remain[ed] in" the apartment—or was even fully "in" it at any point—during the crime. The occupants managed to prevent petitioner from ever getting his entire body into the apartment, and his arm may have been inside only fleetingly. Without a reference to "entry," *Taylor* would have risked excluding convictions under burglary statutes that cover conduct of that sort. The need to encompass such conduct is likely why no state legislature has ever chosen to draft a burglary statute to cover only "remaining in" burglary. See pp. 19-25, *infra*.

Finally, assuming the antisurplusage canon applied and some surplusage existed, the canon would not require interpreting a word unnaturally. See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176 (2012) ("[A] court may well prefer ordinary meaning to an unusual meaning that will avoid surplusage."); see also, *e.g.*, *Sullivan* v. *Stroop*, 496 U.S. 478, 482 (1990) ("If the statute is clear and unambiguous, 'that is the end of the matter.'"). Being somewhat repetitive or redundant does not turn one word into another.

2. Legal authority at the time of the ACCA supports the plain meaning of "remaining"

When assessing the meaning of "burglary" in the ACCA, this Court has looked to state burglary laws in place when Congress enacted the current version of the ACCA in 1986, to the definition of "burglary" in the original 1984 version of the ACCA, and to certain commentators. *E.g.*, *Stitt*, 139 S. Ct. at 406; *Taylor*, 495 U.S. at 593-599. As this Court already observed in defining generic "burglary" to include "remaining * * * with intent, *Taylor*, 495 U.S. at 599, most States in 1986 had "remaining in" burglary statutes and the 1984 version of the ACCA covered "remaining in" burglary as well. See 18 U.S.C. App. 1202(c)(9) (Supp. III 1985). To whatever degree Congress might have studied the issue, it would have understood state laws criminalizing "remaining in" burglary to impose criminal liability consistent with the plain meaning of that phrase to refer to a continuous period of time. A contrary definition that referred only to an instant would not have been "generic," *Taylor*, 495 U.S. at 598—and indeed would have effectively broken new ground.

a. State burglary law indicated that criminal intent could be formed while "remaining"

Contrary to petitioner's contention (*e.g.*, Br. 25)—which is largely based on a survey that tries to answer the wrong question, see Part C.1, *infra*—state burglary law in 1986 supported the ordinary continuous meaning of "remaining." Reading ACCA burglary more narrowly would subvert *Taylor* by turning Congress from a descriptor of then-current burglary law into a prognosticator of future burglary-law developments—and a bad prognosticator at that.

i. The relevant universe for understanding "remaining in" burglary consists of the 29 States that, at the time ACCA was enacted in 1986, prohibited "remaining in" burglary. Of those jurisdictions, 27 had statutes prohibiting "entering or remaining" with intent (or the equivalent), and are thus substantially identical on their face to *Taylor*'s formulation. See Ala. Code § 13A-7-7(a) (1982); Alaska Stat. § 11.46.310(a) (1983); Ariz. Rev. Stat. Ann. § 13-1506(A) (Supp. 1986); Ark. Stat. Ann. § 41-2002(1) (1977); Colo. Rev. Stat. § 18-4-203(1) (1986); Conn. Gen. Stat. Ann. § 53a-103(a) (West 1972); Del. Code Ann. tit. 11, § 824 (1979); Fla. Stat. ch. 810.02(1) (1985); Ga. Code Ann. § 16-7-1(a) (Michie 1984); Haw. Rev. Stat. § 708-810(1) (1985); Ill. Rev. Stat. ch. 38, para. 19-1(a) (1983); Iowa Code § 713.1 (1985); Kan. Stat. Ann. § 21-3715 (Supp. 1980); Ky. Rev. Stat. Ann. § 511.040(1) (Michie 1985); Me. Rev. Stat Ann. tit. 17-A, § 401(1) (West 1983); Minn. Stat. §§ 609.581(4), 690.582(3) (1986); Mo. Rev. Stat. § 569.170(1) (1986); Mont. Code Ann. § 45-6-204(1) (1985); N.J. Stat. Ann. § 2C:18-2(a) (West 1982); N.Y. Penal Law § 140.20 (McKinney 1975); N.D. Cent. Code § 12.1-22-02(1) (1985); Or. Rev. Stat. § 164.215(1) (1983); S.D. Codified Laws § 22-32-8 (1979); Utah Code Ann. § 76-6-202(1) (1978); Vt. Stat. Ann. tit. 13, § 1201(a) (Supp. 1982); Wash. Rev. Code. §§ 9A.52.030(1), 9A.52.040 (1985); Wyo. Stat. Ann. § 6-3-301(a) (Supp. 1986).

A 28th State, Ohio, prohibited "trespass" with criminal intent, which encompasses both entry and remaining. Ohio Rev. Code Ann. § 2911.12(A) (Anderson Supp. 1985). And a 29th State, Texas, criminalized "remaining in" burglary by prohibiting an unlawful entry followed by the commission of a felony or theft while inside. Tex. Penal Code Ann. § 30.02(a)(3) (West 1974); see LaFave

§ 8.13(b), at 468 & n.44 (listing Texas as a "remaining in" jurisdiction).[1] Federal law also included limited-purpose provisions prohibiting entering or remaining with intent. See 18 U.S.C. 1752(a) (1982) (certain federal buildings); 18 U.S.C. 2118(b) (Supp. III 1985) (facilities relating to controlled substances).

Not one of those statutes indicated that, in contravention of the ordinary meaning of "remaining in," criminal liability was limited to situations in which the intruder had the requisite intent at the initial moment his remaining became unlawful, thereby excluding situations in which an intruder developed that intent while remaining. Where a statute's language directly addressed the issue—as Texas's did—it explicitly criminalized such conduct. See Tex. Penal Code Ann. § 30.02(a)(3) (West 1974) (unlawful to "enter[] a building or habitation and commit[] or attempt[] to commit a felony or theft"). And the other statutes simply used the term "remaining" (or "trespass") without any special qualification that would suggest any departure from its ordinary meaning. Congress accordingly would have understood "remaining" (or the equivalent language) in all of those statutes in its ordinary, continuous sense.

To the extent that Congress might have examined it, state decisional law on point was fairly limited—but would have reinforced the plain import of the statutes' text. Only 7 of the 29 States had judicial decisions interpreting the duration of "remaining in" liability, and *none* had squarely foreclosed liability where criminal intent is formed after some initial moment of remaining. To the contrary, courts in five States had held that in-

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[1] Mississippi also had a statute like Texas's, see Miss. Code. Ann. § 97-17-25 (1973), but it had not been cited in any published decision.

tent may be formed "while the accused remains unlawfully." *Gratton* v. *State*, 456 So. 2d 865, 872 (Ala. Crim. App. 1984); see *State* v. *Embree*, 633 P.2d 1057, 1059 (Ariz. Ct. App. 1981); *Keith* v. *State*, 225 S.E.2d 719, 720-721 (Ga. Ct. App. 1976); *State* v. *Mogenson*, 701 P.2d 1339, 1343-1345 (Kan. Ct. App. 1985); *State* v. *Papineau*, 630 P.2d 904, 906-907 (Or. Ct. App. 1981).

Courts in two additional states (Ohio and Illinois) had come to conflicting or ambiguous conclusions and thus had not resolved the question. See *State* v. *Fontes*, 721 N.E.2d 1037, 1039-1040 (Ohio 2000) (concluding that intent may be formed while unlawfully remaining, and resolving pre-1986 conflict between *State* v. *Flowers*, 475 N.E.2d 790, 791-792 (Ohio Ct. App. 1984), and *State* v. *Jones*, 440 N.E.2d 580, 851 (Ohio Ct. App. 1981)); Pet. Br. 34 (recognizing that law in Illinois was ambiguous); compare *People* v. *Boose*, 487 N.E.2d 1088, 1091 (Ill. App. Ct. 1985) ("A criminal intent formulated after a lawful entry will satisfy the offense[] of * * * burglary by illegally remaining."), with *People* v. *Vallero*, 378 N.E.2d 549, 549-550 (Ill. App. Ct. 1978) (stating that intent must exist at the time of entry to establish remaining in liability, where defendant was invited into building to apply for a job and his authority to be present was never revoked), and *Vallero*, 378 N.E.2d at 551 (Stengel, J., specially concurring) (concluding that the defendant's presence was always lawful); see also *People* v. *Bradford*, 50 N.E.3d 1112, 1120 (Ill. 2016) (clarifying that a person "remain[s] in a public place only where he exceeds his physical authority to be on the premises.").

ii. Against that backdrop, Congress would have expected the ACCA's reference to "burglary," which included "remaining in" burglary, *Taylor*, 495 U.S. at 599, to encompass a natural understanding of "remaining."

An "initial moment" requirement would have been an alteration, not a "reflect[ion]," of "'the generic sense in which the term was used in the criminal codes of most States.'" *Stitt*, 139 S. Ct. at 406 (quoting *Taylor*, 495 U.S. at 598) (brackets omitted). Nothing in *Taylor*, any other decision of this Court, or the text or history of the ACCA suggests that Congress intended the generic term "burglary" to impose novel and unstated restrictions on an ordinary understanding of "remaining in" burglary.

Indeed, it would have been pointless and self-defeating to include "remaining in" burglary in the generic definition, yet simultaneously to define that phrase more narrowly and specifically than any state law would have established at the time. Although purporting to include "remaining in" burglary laws, such a definition would in fact have excluded the "remaining in" burglary laws in all six States to have clearly decided the scope of "remaining" (Alabama, Arizona, Georgia, Kansas, Oregon, and Texas). And it would have done nothing to ensure inclusion of the "remaining in" burglary laws of the 23 additional States in which the question remained open (including the two that had conflicting or ambiguous precedent). Those States could well have followed the others and applied their burglary statutes to impose criminal liability in circumstances where intent is formed while unlawfully "remaining in."

Indeed, as it turns out, that is exactly what most States have done. Today, three more States (32 total) have "remaining in" burglary. See Mich. Comp. Laws Ann. § 750.110a(4)(a) (West 2004); N.H. Rev. Stat. Ann. § 635:1(I) (LexisNexis 2015); Tenn. Code Ann. § 39-14-402(a) (2018). Among those 32 States, a total of 18 explicitly allow (either by statute or judicial decision)

for intent to be formed at any point during the remaining: Eight States now have statutes that are explicit about the continuous-remaining rule. See Colo. Rev. Stat. § 18-4-201(3) (2017); Del. Code Ann. tit. 11, § 829(d) (2015); Haw. Rev. Stat. Ann. § 708-812.5 (LexisNexis 2016); Mich. Comp. Laws Ann. § 750.110a(4)(a) (West 2004); Minn. Stat. Ann. §§ 609.581(4), 609.582(3) (West 2018); Mont. Code Ann. § 45-6-204(1) (2017); Tenn. Code Ann. § 39-14-402(a)(3) (2018); Tex. Penal Code Ann. § 30.02(a)(3) (West Supp. 2018). And a total of ten States have judicial decisions to the same effect. See pp. 21-22, *supra* (citing pre-1986 cases); *Braddy* v. *State*, 111 So. 3d 810, 844 (Fla. 2012) (per curiam); *State* v. *Walker*, 600 N.W.2d 606, 609 (Iowa 1999); *State* v. *DeNoyer*, 541 N.W.2d 725, 732 (S.D. 1995); *State* v. *Rudolph*, 970 P.2d 1221, 1228-1229 (Utah 1998); *State* v. *Allen*, 110 P.3d 849, 853-855 (Wash. Ct. App. 2005); see also Pet. Br. 49-51 (classifying Ohio and Utah as ambiguous only in respect to pre-1986 law). Only three States appear to require that the intent coincide with the "initial moment" of remaining, and all have adopted that approach in post-1986 decisions. See *Shetters* v. *State*, 751 P.2d 31, 36 (Alaska Ct. App. 1988); *People* v. *Gaines*, 546 N.E.2d 913, 915 (N.Y. 1989); *In re J.N.S.*, 308 P.3d 1112, 1117-1118 (Or. Ct. App. 2013).[2]

Congress cannot be deemed to have guessed—incorrectly—that after 1986, States would adopt a then-near-novel interpretation of "remaining in" burglary that is limited to "initial moment" remaining. Cf. *Stitt*, 139 S. Ct. at 406-407. The 18 States that follow the majority rule have an estimated population of more than

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[2] Oregon courts thus switched their position on the issue, in response to intervening developments from the Oregon Supreme Court. See *In re J.N.S.*, 308 P.3d at 1118.

130 million people. See Population Div., U.S. Census Bureau, *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2018* (Dec. 2018). Any or all of the 11 additional States that prohibit "remaining in" burglary, but have not yet explicitly addressed its scope, could adopt the majority rule in the future. And the 19 States that currently do not criminalize "remaining in" burglary might amend their burglary laws to do so. Congress could not have been so agnostic about creating such a major hole in the ACCA's coverage.

To the contrary, *Taylor* observed that only "[a] few States' burglary statutes * * * define burglary more broadly" than ACCA's generic definition. 495 U.S. at 599. And "[w]here, as here, the applicability of a federal criminal statute requires a state conviction," this Court "ha[s] repeatedly declined to construe the statute in a way that would render it inapplicable in many States." *Stokeling* v. *United States*, 139 S. Ct. 544, 552 (2019); see also *United States* v. *Castleman*, 572 U.S. 157, 167-168 (2014) (interpreting "physical force" to include common-law force, in part because a different reading would render 18 U.S.C. 922(g)(9) "ineffectual in at least 10 States"). Nothing supports narrowing the generic definition of "burglary," which includes "remaining in," to include only a small minority of the States that criminalize such burglary, based on a limitation that none of them had adopted in 1986.

b. The additional sources that Taylor *consulted are consistent with the ordinary meaning of "remaining"*

Not only had the States not articulated such a limitation, but neither had the other sources on which *Taylor* relied as guideposts. To the extent those sources addressed the issue at all, they supported the ordinary meaning of "remaining."

i. An understanding of "remaining" as a continuous activity is consistent with the definition of "burglary" in the original 1984 version of the ACCA, which Congress deleted (potentially inadvertently) in 1986. See *Taylor*, 495 U.S. at 589-590 & n.5. The 1984 version of the ACCA defined burglary as "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." 18 U.S.C. App. 1202(e)(9) (Supp. III 1985). Although that definition excluded crimes where intent is formed after the intruder's presence is no longer surreptitious (see Pet. Br. 17-18), it plainly encompassed burglaries in which intent is formed *while still surreptitiously remaining*. For example, imagine a person who lawfully enters a store while it is open to the public, hides in a dressing room intending to shelter there, and remains there surreptitiously after the store closes If while still secretly inside the store the intruder decides to rob the cash register, he would "remain[] surreptitiously * * * with intent," consistent with the plain language of the 1984 definition. 18 U.S.C. App. 1202(e)(9) (Supp. III 1985).

Nothing in the text of the 1984 definition suggested that the intent must be formed at the instant the (surreptitious) remaining begins. If anything, this Court's precedents indicated that the term "remaining" would not likely be interpreted that way. See *Cores*, 356 U.S. at 408 ("[T]he crucial word 'remains' permits no connotation other than continuing presence."); cf. *Forest Grove Sch. Dist.* v. *T. A.*, 557 U.S. 230, 239 (2009) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute."). And although *Taylor* determined that the surreptitiousness requirement did not carry over to the 1986 version of the

ACCA, it described the 1984 and 1986 definitions as "practically identical." 495 U.S. at 598. That suggests that "remaining" would have the same, presumably continuous, meaning.

ii. The two secondary sources *Taylor* consulted—the 1986 version of Professor LaFave's treatise on substantive criminal law and the Model Penal Code, see 495 U.S. at 580 & n.3, 593, 598 & n.8—do not suggest otherwise. Neither described "remaining in" as a discrete event that occurs only when the defendant first decides to stay in a building or structure. See LaFave § 8.13(b) and (e), at 468, 473-474 & n.101; Model Penal Code § 221.1 cmt. 3, at 69-71 (1980).

The LaFave treatise's discussion of "remaining in" burglary merely states that "the requisite intent to commit a crime" needed to "exist at the time the defendant unlawfully remained within." § 8.13(b), at 468. That reiterates the undisputed requirement that the intent and the remaining be contemporaneous. But it does not directly address the question here—whether remaining is instantaneous or continuous, and thus whether intent can be formed while remaining. The treatise lists jurisdictions with "remaining in" burglary, and the list includes all six of the jurisdictions (Alabama, Arizona, Kansas, Georgia, Oregon, and Texas) that, as of 1986, had attached liability to an intruder who formed the intent while remaining. See *id.* at 468 n.44. The treatise thus contains no indication that "remaining in" was understood at the time to have anything other than its ordinary, continuous meaning, and in particular no indication that it was understood to be limited to petitioner's "initial moment" rule.

The Model Penal Code is even less illuminating, because its influence on "remaining in" burglary, as covered by the ACCA, is nonexistent. Although *Taylor* described its definition of burglary as "approximat[ing]" the definition of "burglary" in the Model Penal Code, 495 U.S. at 598 n.8, the *Taylor* definition unambiguously departed from the Model Penal Code in including "remaining in" burglary, *id.* at 598. The Model Penal Code "does not include any 'remaining in' language at all." *United States* v. *Herrold*, 883 F.3d 517, 533 (5th Cir. 2018) (en banc), petition for cert. pending, No. 17-1445 (filed Apr. 18, 2018), and petition for cert. pending, No. 17-9127 (filed May 21, 2018). Instead, its drafters recommended "reject[ing]" proposals to recognize remaining in burglary. Model Penal Code § 221.1 cmt. 3, at 71. But that recommendation did not carry the day in a majority of States, or in the ACCA. It thus says nothing about what "remaining in" burglary means in the generic ACCA definition.

B. The Normal Understanding Of "Remaining" Is The Only Definition Consistent With The ACCA's Design

Congress, like the majority of States at the time, had good reason to include "remaining in" burglary in the definition of generic burglary under the ACCA. Congress "viewed burglary as an inherently dangerous crime," *Stitt*, 139 S. Ct. at 406, and its dangers are in no way tied to the esoteric issue of whether an intruder formed the intent to commit a crime at the precise moment when his presence became unlawful, or instead seconds or minutes later.

1. As this Court has explained, Congress in both 1984 and 1986 singled out burglary as an ACCA predicate because of the crime's "inherent potential for harm

to persons." *Taylor*, 495 U.S. at 588. Congress recognized that burglary "creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate." *Stitt*, 139 S. Ct. at 406 (quoting *Taylor*, 495 U.S. at 588); see *James* v. *United States*, 550 U.S. 192, 203 (2007), overruled on other grounds by *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). And Congress viewed burglary as "one of the 'most damaging crimes to society' because it involves 'invasion of [victims'] homes or workplaces, violation of their privacy, and loss of their most personal and valued possessions.'" *Taylor*, 495 U.S. at 581 (quoting H.R. Rep. No. 1073, 98th Cong., 2d Sess. 3 (1984)) (brackets in original).

Accordingly, this Court has repeatedly rejected efforts by defendants to inject "arcane distinctions" into the term "burglary" that have "little relevance to modern law enforcement concerns," and in particular have no bearing on the risk of violent confrontation. *Taylor*, 495 U.S. at 593. For example, earlier this Term in *Stitt*, this Court declined to interpret "burglary" to exclude the burglary of a vehicle or other structure that is adapted or used for overnight accommodation, reasoning that an offender's unlawful entry into such a location "runs a similar or greater risk of violent confrontation" as compared to a traditional home. 139 S. Ct. at 406.

2. None of the factors that this Court has identified as making burglary dangerous—the risk of a violent confrontation, the defendant's culpability, or the violation of personal privacy—depends on whether the intruder developed his criminal intent at the exact moment he was first unlawfully present or at some point later while still unlawfully remaining inside. "The timing of when intent was formed implicates neither the

culpability of the perpetrator nor the extent of danger to victims." *Herrold*, 883 F.3d at 547 (Haynes, J., dissenting). Once the intruder is both (1) unlawfully present inside a structure *and* (2) has the requisite intent to commit a crime, all of the practical concerns that led Congress to include "burglary" as an ACCA predicate apply with full force. At that point, the defendant is an intruder into a private space; he is bent on committing a crime; and a resident or other person who encounters him is unlikely to know—or care—how long before the encounter he hatched his criminal plan.

For example, imagine a person who is home alone and is awoken in the middle of the night by the sound of footsteps downstairs, and who gets up to investigate and encounters an intruder in the dark who is in the process of stealing a television. Such an intruder is no mere trespasser; he has decided not only to enter someone's home without permission, but also to commit a crime while there. And when the homeowner encounters the intruder doing so, it is irrelevant whether the intruder decided to steal the television before, during, or after the time he first broke into the house. The victim's terror and sense of invasion, the possibility that the victim will defend himself or herself and the home through violent force, and the possibility that the perpetrator will initiate violence when encountered, will all be the same, regardless of how long before the encounter the intruder made up his mind to violate the law.

A distinction between intent formed at the instant presence becomes unlawful and intent formed while unlawfully present would create arbitrary results that have nothing to do with burglary's inclusion as an ACCA predicate. Imagine a woman invites her ex-boyfriend into her home, he makes unwanted advances,

and she demands that he leave and tries to kick him out. Under either petitioner's or the government's approach, the ex-boyfriend is guilty of "remaining in" burglary if he refuses to leave and at the same time harbors the intent to steal or destroy items that are hers, or to sexually assault her. But under petitioner's approach, he would *not* be guilty of burglary if he developed precisely the same intent (or even completed the crime) seconds or minutes later. The divergent treatment of two functionally identical situations, where the seriousness and culpability of trespassing with the intent to steal property or sexually assault a person in her own home is exactly the same, makes little sense. And nothing in the ACCA or *Taylor* suggests that Congress distinguished between them.

3. Petitioner's only suggestion (Br. 3, 53-55) as to why Congress might have intended a cramped meaning of "remaining" is to invoke a hypothetical hiker or homeless person who commits a "low-risk, spur-of-the-moment crime[] of opportunity, such as stealing clothing or food, while trespassing to seek shelter from the cold." But for several reasons, that hypothetical provides no support for a rule under which a burglar must form the intent to commit a crime at the precise moment his presence becomes unlawful.

First, petitioner provides no sound basis for deeming such a burglary to be "low-risk." "The main risk of burglary arises * * * from the possibility of a face-to-face confrontation between the burglar and a third party—whether an occupant, a police officer, or a bystander—who comes to investigate." *James*, 550 U.S. at 203. Whoever comes to investigate will typically not know that the intruder is a "hiker"; the intruder will simply be a stranger who is unlawfully present and committing

a crime. Second, to the extent that the intruder's identity as a hiker *were* known, his dangerousness would not turn on whether he formed the intent to steal food at the precise moment he broke in (because he was hungry then) or formed it afterward (because he became hungry later). Either way, he is someone who is willing to commit a crime in a private space where he has no right to be, triggering the dangers inherent in burglary. Third, this Court has long understood that Congress did not expect *every* instance of an ACCA enumerated offense be violent. See *id.* at 208. Rather, Congress determined that such offenses are generally violent, and thus made them ACCA predicates, irrespective of the possibility of corner cases. See *ibid.* (discussing extortion). And Congress minimized the probability of misclassification by requiring the defendant to have not one but *three* qualifying convictions, 18 U.S.C. 924(e)(1), which are unlikely to *all* have occurred in unusual ways.

Finally, to the extent petitioner's argument rests on a concern that "remaining in" burglary covers conduct that should be treated as less culpable than what he might consider to be classic "burglary," that concern has no place in construing generic burglary under the ACCA. Congress intended for "burglary" in the ACCA to be descriptive, and "the contemporary understanding of 'burglary' has diverged a long way from its common-law roots," to the point that the "'modern crime * * * has little in common with its common-law ancestor except for the title of burglary.'" *Taylor*, 495 U.S. at 593 (citation omitted); see *id.* at 598. For example, States have rejected commentators' objections that eliminating the surreptitiousness requirement would overbroaden burglary. See, *e.g.*, Model Penal Code § 221.1 cmt. 3, at

71; LaFave § 8.13(b), at 468. And petitioner's own "initial moment" rule both includes conduct dissimilar from traditional burglary (such as the ex-boyfriend who intends to assault his ex-girlfriend at the moment she asks him to leave) and excludes conduct nearly identical to traditional burglary (such as an intruder who breaks into a house at night to get some rest, and moments later develops the intent to commit theft). Accordingly, even if petitioner's normative concerns about the scope of "burglary" were relevant, his rule would not address them.

C. Petitioner's "Initial Moment" Rule Is Unsupported And Unsound

Petitioner identifies little basis for an abnormal interpretation of "remaining in," under which "remaining" is ephemeral. For the most part, he emphasizes the separate—and undisputed—requirement that the burglar's criminal intent be contemporaneous with his "remaining in," without addressing what "remaining in" itself means. And adopting an unnatural interpretation of ACCA burglary would undermine the clarity that *Taylor*'s definition of "burglary" would otherwise provide, and encourage a morass of further litigation about the meaning of the term.

1. Petitioner's state survey is misguided

Petitioner devotes much of his brief (Br. 25-51) to an exhaustive survey purporting to establish that, when Congress amended the ACCA to its current form in 1986, a "substantial majority of states—at least 37—retained a contemporaneous-intent requirement." Pet. Br. 26. That survey is both inapposite and inaccurate.

a. As a threshold matter, the stated goal of petitioner's survey (Br. 25) is to identify state burglary laws

with a "contemporaneous-intent requirement." But that is not directly relevant to the question presented. The result in this case does not depend on whether ACCA burglary includes a "contemporaneous-intent requirement," in the sense that the intruder must possess the requisite intent at the same time he enters or remains. Everyone agrees that it does. The key question is instead whether the defendant "remains" in a structure not just at the first moment he is inside, but for the entire time that he stays inside, and therefore can develop his criminal intent while remaining.

Petitioner's survey does not answer that question. For example, his count of jurisdictions favoring his position mostly consists of the 22 jurisdictions that, in 1986, did not prohibit "remaining" at all and instead prohibited only "entry." See Cal. Penal Code § 459 (Deering 1985); D.C. Code Ann. § 22-1801(a) (1981); Idaho Code § 18-1401 (Supp. 1981); Ind. Code Ann. § 35-43-2-1 (Burns Supp. 1984); La. Rev. Stat. Ann. § 14:62 (West 1986); Md. Ann. Code art. 27, § 30(a) (1982); Mass. Gen. L. ch. 266, § 15 (1986); Mich. Comp. Laws § 750.110 (1981); Miss. Code Ann. § 97-17-19 (1973); Neb. Rev. Stat. § 28-507(1) (1985); Nev. Rev. Stat. Ann. § 205.060(1) (Michie 1986); N.H. Rev. Stat. Ann. § 635:1(I) (1986); N.M. Stat. Ann. § 30-16-3 (Michie 1978); N.C. Gen. Stat. § 14-51 (1986); Okla. Stat. Ann. tit. 21, § 1435 (West 1983); 18 Pa. Cons. Stat. Ann. § 3502(a) (1983); R.I. Gen. Laws § 11-8-1 (1981); S.C. Code Ann. § 16-11-313(A) (Law. Co-op. Supp. 1985); Tenn. Code Ann. § 39-3-401(a) (1982); Va. Code Ann. § 18.2-89 (Michie 1982); W. Va. Code Ann. § 61-3-11(a)-(b) (Michie 1977); Wisc. Stat. Ann. § 943.10(1) (West 1982). But *Taylor* recognized that Congress did not intend for "burglary" under the ACCA to be limited to "entry" burglary, so the laws and court

decisions in those jurisdictions with that limitation shed no meaningful light on what it means to "remain[] * * * with intent." 495 U.S. at 599.

b. Even when examining "remaining in" jurisdictions, petitioner's methodology is flawed and inconsistent. Petitioner identifies (Br. 30-42, 44) 15 States that prohibited "remaining in" burglary and that, according to him, defined such burglary in the manner he proposes for the ACCA. But he identifies none that had done so *in 1986*, when the ACCA was enacted.

For 5 of the 15 States (Alaska, Delaware, Hawaii, Minnesota, and New York), petitioner relies (Br. 30, 32-33, 37-38, 41) exclusively on *post*-1986 judicial decisions, which had not yet been rendered when the ACCA was enacted. For two others (Missouri and Vermont), petitioner identifies (Br. 38-39, 44) no judicial decision before *or* after 1986 addressing the relevant question.

For the other 8 of the 15 States (Arkansas, Colorado, Connecticut, Illinois, Maine, Montana, New Jersey, and North Dakota), petitioner relies (Br. 31-36, 39-42) mostly on cases that merely hold that, to commit "entry" burglary, a person must possess the requisite intent at the time of entry. The word "remain" does not even appear in most of the pre-ACCA decisions that petitioner cites from those jurisdictions. See *Hickerson* v. *State*, 667 S.W.2d 654, 655-656 (Ark. 1984) (unlawful entry of house); *People* v. *Barnhart*, 638 P.2d 814, 816 (Colo. App. 1981) (breaking and entering school); *People* v. *Weaver*, 243 N.E.2d 245, 248 (Ill. 1968) (entry into store "without authority" while still open), cert. denied, 395 U.S. 959 (1969); *State* v. *Field*, 379 A.2d 393, 395 (Me. 1977) (break-in of restaurant); *State* v. *Pyron*, 495 A.2d 467, 468 (N.J. Super. Ct. App. Div. 1985) (forceful entry of apartment); see also *Young* v. *State*,

266 S.W.3d 744, 750 (Ark. 2007) (relying on *Hickerson* for its understanding of "ent[ry]," but not invoking *Hickerson* in connection with "remaining in"); *Boose*, 487 N.E.2d at 1091 (describing *Weaver* as a case only about "entry" burglary). And in the few decisions where it does appear, the reference to "remaining" is clearly inapposite. See *State* v. *Manthie*, 641 P.2d 454, 456-457 (Mont. 1982) (finding sufficient evidence that the defendant unlawfully "remained," but not addressing whether intent may be formed while remaining); Pet. Br. 42 (acknowledging that North Dakota decisions, including *State* v. *Arne*, 311 N.W.2d 186 (N.D. 1981), "have not addressed" the issue here).

Petitioner does cite (Br. 32-33) pre-1986 "remaining in" burglary cases in Connecticut and Illinois, but they address a different question from the one at issue here. They hold that "remaining in" burglary occurs only when the initial entry was lawful and the intruder overstays his welcome. See *State* v. *Belton*, 461 A.2d 973, 976 (Conn. 1983); *People* v. *Green*, 404 N.E.2d 930, 932 (Ill. App. Ct. 1980), abrogated in part on other grounds by *People* v. *Maggette*, 747 N.E.2d 339 (Ill. 2001); see also *Arabie* v. *State*, 699 P.2d 890, 894-895 (Alaska Ct. App. 1985) (similar contemporaneous decision); cf. *Young*, 266 S.W.3d at 744 (post-1986 decision); *State* v. *Edwards*, 524 A.2d 648, 653 (Conn. App. Ct. 1987) (same); *Delgado* v. *State*, 776 So. 2d 233, 238-241 (Fla. 2000) (per curiam) (same);[3] *Gaines*, 546 N.E.2d at 915 (same). Such a holding does not presuppose, or dictate, a requirement that criminal intent exist at the exact moment the defendant's presence becomes unlawful. It is

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[3] *Delgado* also held that remaining must be surreptitious, but that holding has been superseded by statute. See *Sparre* v. *State*, 164 So. 3d 1183, 1201 (Fla.) (per curiam), cert. denied, 136 S. Ct. 411 (2015).

equally consistent with the majority rule that intent may be formed while "remaining." See, *e.g.*, *Braddy*, 111 So. 3d at 844 (Florida Supreme Court employing majority rule on formation of intent in conjunction with lawful-entry definition of "remaining").

c. In addition, petitioner's survey incorporates post-1986 developments only when they are (assertedly) helpful, while omitting such developments when they are not. For example, petitioner relies (Br. 41) on a 1989 decision as the basis for classifying New York as adopting the minority rule he favors. See *Gaines*, 546 N.E.2d at 915-916. But he asserts (Br. 49-51) that the positions of Ohio and Utah were "[a]mbiguous"—even though post-1986 decisions from their Supreme Courts squarely adopted the majority rule. See *Rudolph*, 970 P.2d at 1228-1229; *Fontes*, 721 N.E.2d at 1039-1040. Similarly, petitioner relies (Br. 31-33) on post-1986 decisions to categorize Colorado, Delaware, and Hawaii as supporting his understanding of Congress's intent in 1986. See *Cooper* v. *People*, 973 P.2d 1234, 1236 (Colo. 1999) (en banc); *Dolan* v. *State*, 925 A.2d 495, 501 (Del. 2007); *State* v. *Mahoe*, 972 P.2d 287, 291-293 (Haw. 1998). But legislatures in all three States responded by abrogating those decisions and instead amending their burglary statutes to adopt the majority rule. See 1999 Colo. Sess. Laws 326-327; 76(2) Del. Laws 115 (2007-2008); 2006 Haw. Sess. Laws 997. Those jurisdictions thus would not support petitioner's position either in 1986 or today.

All in all, as noted earlier, see pp. 19-25, *supra*, petitioner's "initial moment" rule requires an unnatural reading of the word "remaining" that no State's "remaining in" burglary statute has ever expressly suggested; the rule was rejected by six States before 1986;

petitioner does not identify *any* State that had adopted it in 1986; and he has identified only three that do so now, as opposed to 18 that endorse the broader rule. See *ibid.* Even putting aside the anachronism of relying on the legal landscape *after* the ACCA was enacted, it is difficult to believe that Congress would have adopted the three-State approach rather than the 18-State one.

2. Petitioner's position overcomplicates* Taylor *and invites substantial additional ACCA litigation

More fundamentally, it is difficult to believe that Congress (in the pre-internet age) engaged in the exhaustive exercise that occupies 22 pages of petitioner's brief—or intended that courts called upon to interpret the ACCA do so. Nor did this Court in *Taylor* appear to anticipate that applying its definition of burglary would involve resolving disputes at this level of granularity. Rather than countenancing such results, the easiest way to resolve the question presented in this case is with a plain-English application of *Taylor*: "remaining in" means what "remaining in" ordinarily means, encompassing both the beginning and the continuation of the period when a person stays inside. See, *e.g.*, *Cores*, 356 U.S. at 408-409.

The question presented here is unlikely to be the last arcane interpretive distinction of burglary (or another enumerated offense) that a litigant might seek to advance. A straightforward interpretation of *Taylor* can help to forestall further litigation that unrealistically presumes congressional omniscience about state-court decisions addressing every possible variant of burglary. In enacting the ACCA, Congress drew a circle, not a squiggle, around state burglary laws.

As the above discussion illustrates, States have not always had decisional law addressing every possible aspect of burglary, have sometimes had conflicting decisional law, and have changed their law over the course of time. Efforts to pinpoint state law on a particular date are, of course, inevitable in the context of generic offenses. But overly corrugated definitions of those offenses multiply the number of features that must be examined, and increase the likelihood of indeterminacy, confusion, and conflicts in the federal courts.

Taylor counsels strongly against such an approach. The Court in *Taylor* recognized that "exact formulations" of burglary "vary" among the States; viewed the "omission of a definition of burglary" in the ACCA itself to "impl[y], at most, that Congress did not wish to specify an exact formulation that an offense must meet in order to count as 'burglary'"; and gave that term a "generic meaning" with "basic elements" that a state offense could satisfy "regardless of its exact definition or label." 495 U.S. at 598-599. Nothing in *Taylor* invites fine-grained distinctions, or conscripts courts into an increasingly complex and time-consuming role as the historical cartographers of state burglary law.

D. The Court Of Appeals Correctly Upheld Petitioner's Sentence

Under a plain reading of *Taylor*, petitioner's prior conviction for third-degree home invasion, in violation of Mich. Comp. Laws Ann. § 750.110a(4)(a) (West Supp. 2001), is a conviction for "burglary." As relevant here, petitioner's conviction required proof of (1) "break[ing] and enter[ing] a dwelling or enter[ing] a dwelling without permission" and (2) "commit[ing] a misdemeanor" while inside, *ibid.*—in petitioner's case, "assault," J.A. 25 (capitalization omitted) (charging document); see *Mathis*

v. *United States*, 136 S. Ct. 2243, 2249 (2016) (permitting reference to charging document to determine elements necessary for prior conviction). It thus "ha[s] the basic elements," *Taylor*, 495 U.S. at 599, of generic burglary.

Breaking or entering a dwelling is "unlawful or unprivileged entry into, or remaining in, a building or structure," and commission of assault requires "intent to commit a crime." *Taylor*, 495 U.S. at 599; see *People* v. *Johnson*, 284 N.W.2d 718, 718-719 (Mich. 1979) (assault requires "either an intent to injure or an intent to put the victim in reasonable fear or apprehension of an immediate battery").[4] In conjunction with his two other undisputed violent felony convictions (both for assault), petitioner qualifies for an ACCA sentence. Indeed, as the district court concluded, he presents "the paradigm picture for somebody * * * that should fall within the [ACCA]." J.A. 74.

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[4] To the extent petitioner suggests (Br. 9) that a defendant *could* be convicted of Michigan third-degree home invasion without ever forming criminal intent, such an argument was neither pressed nor passed on below and is not fairly encompassed within the question presented in the petition. See Pet. I (seeking review of whether "it is enough that the defendant formed the intent to commit a crime at any time while 'remaining in' the building"). Although petitioner's merits brief (at I) reformulates the question presented, "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court," Sup. Ct. R. 14.1(a). In any event, such an argument would lack merit. See, *e.g.*, *United States* v. *Bonilla*, 687 F.3d 188, 193 (4th Cir. 2012) ("[P]roof of a completed or attempted felony *necessarily* requires proof that the defendant formulated the intent to commit a crime either prior to his unlawful entry or while unlawfully remaining."), cert. denied, 571 U.S. 829 (2013). Nor would the argument suggest a different result in petitioner's own case, because the charging document required proof that his burglary involved intent to commit an assault or the actual commission of assault, which is a specific intent crime. See J.A. 25; see also *Mathis*, 136 S. Ct. at 2249.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

1. 18 U.S.C. 924 (2012) provides in relevant part:

Penalties

* * * * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * * * *

2. Mich. Comp. Laws Ann. § 750.110a (West Supp. 2001) provides:

Definitions; breaking and entering a dwelling; crime of home invasion, penalties

Sec. 110a. (1) As used in this section:

(a) "Dwelling" means a structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter.

(b) "Dangerous weapon" means 1 or more of the following:

(*i*) A loaded or unloaded firearm, whether operable or inoperable.

(*ii*) A knife, stabbing instrument, brass knuckles, blackjack, club, or other object specifically designed or customarily carried or possessed for use as a weapon.

(*iii*) An object that is likely to cause death or bodily injury when used as a weapon and that is used as a weapon or carried or possessed for use as a weapon.

(*iv*) An object or device that is used or fashioned in a manner to lead a person to believe the object or device is an object or device described in subparagraphs (*i*) to (*iii*).

(c) "Without permission" means without having obtained permission to enter from the owner or lessee of the dwelling or from any other person lawfully in possession or control of the dwelling.

(2) A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:

(a) The person is armed with a dangerous weapon.

(b) Another person is lawfully present in the dwelling.

(3) A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the second degree.

(4) A person is guilty of home invasion in the third degree if the person does either of the following:

(a) Breaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor.

(b) Breaks and enters a dwelling or enters a dwelling without permission and, at any time while the person is entering, present in, or exiting the dwelling, violates any of the following ordered to protect a named person or persons:

(*i*) A probation term or condition.

(*ii*) A parole term or condition.

(*iii*) A personal protection order term or condition.

(*iv*) A bond or bail condition or any condition of pretrial release.

(5) Home invasion in the first degree is a felony punishable by imprisonment for not more than 20 years or a fine of not more than $5,000.00, or both.

(6) Home invasion in the second degree is a felony punishable by imprisonment for not more than 15 years or a fine of not more than $3,000.00, or both.

(7) Home invasion in the third degree is a felony punishable by imprisonment for not more than 5 years or a fine of not more than $2,000.00, or both.

(8) The court may order a term of imprisonment imposed for home invasion in the first degree to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction.

(9) Imposition of a penalty under this section does not bar imposition of a penalty under any other applicable law.

APPENDIX B

State Burglary Statutes at the Time of 18 U.S.C. 924(e)(2)(B)(ii)'s Enactment (Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. I, § 1402, 100 Stat. 3207-39)*

Alabama: *Covered remaining*

Burglary in the first degree.

(a) A person commits the crime of burglary in the third degree if he knowingly enters or remains unlawfully in a building with intent to commit a crime therein.

Ala. Code § 13A-7-7(a) (1982).

Alaska: *Covered remaining*

Burglary in the second degree.

(a) A person commits the crime of burglary in the second degree if the person enters or remains unlawfully in a building with intent to commit a crime in the building.

Alaska Stat. § 11.46.310(a) (1983).

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* This appendix contains the text of each State's statute providing the baseline definition of burglary. This does not detail the various degrees of burglary offenses in each State.

Arizona: *Covered remaining*

Burglary in the third degree; classification

A. A person commits burglary in the third degree by entering or remaining unlawfully in or on a nonresidential structure or in a fenced commercial or residential yard with the intent to commit any theft or any felony therein.

Ariz. Rev. Stat. Ann. § 13-1506(A) (Supp. 1986).

Arkansas: *Covered remaining*

Burglary.—

(1) A person commits burglary if he enters or remains unlawfully in an occupiable structure of another person with the purpose of committing therein any offense punishable by imprisonment.

Ark. Stat. Ann. § 41-2002(1) (1977).

California: *Entry only*

Burglary

Every person who enters any house, room, apartment * * * with intent to commit grand or petit larceny or any felony is guilty of burglary.

Cal. Penal Code § 459 (Deering 1985).

Colorado: *Covered remaining*

Second degree burglary.

(1) A person commits second degree burglary, if he knowingly breaks an entrance into, or enters, or remains unlawfully in a building or occupied structure

with intent to commit therein a crime against a person or property.

Colo. Rev. Stat. § 18-4-203(1) (1986).

Connecticut: *Covered remaining*

Burglary in the third degree: Class D felony

(a) A person is guilty of burglary in the third degree when he enters or remains unlawfully in a building with intent to commit a crime therein.

Conn. Gen. Stat. Ann. § 53a-103(a) (West 1972).

Delaware: *Covered remaining*

Burglary in the third degree: class D felony.

A person is guilty of burglary in the third degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein.

Del. Code Ann. tit. 11, § 824 (1979).

District of Columbia: *Entry only*

Definition and penalty.

(a) Whoever shall, either in the nighttime or in the daytime, break and enter, or enter without breaking, any dwelling, or room used as a sleeping apartment in any building, with intent to break and carry away any part thereof, or any fixture or other thing attached to or connected thereto or to commit any criminal offense, shall, if any person is in any part of such dwelling or sleeping apartment at the time of

such breaking and entering, or entering without breaking, be guilty of burglary in the first degree. * * *

D.C. Code Ann. § 22-1801(a) (1981).

Florida: *Covered remaining*

Burglary.—

(1) "Burglary" means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.

Fla. Stat. ch. 810.02(1) (1985).

Georgia: *Covered remaining*

Burglary.

(a) A person commits the offense of burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another or enters or remains within any other building, railroad car, aircraft, or any room or any part thereof. * * *

Ga. Code Ann. § 16-7-1(a) (Michie 1984).

Hawaii: *Covered remaining*

Burglary in the first degree.

(1) A person commits the offense of burglary in the first degree if he intentionally enters or remains unlawfully in a building, with intent to commit

therein a crime against a person or against property rights, and:

(a) He is armed with a dangerous instrument in the course of committing the offense; or

(b) He intentionally, knowingly, or recklessly inflicts or attempts to inflict bodily injury on anyone in the course of committing the offense; or

(c) He recklessly disregards a risk that the building is the dwelling of another, and the building is such a dwelling.

Haw. Rev. Stat. § 708-810(1) (1985).

Idaho: *Entry only*

Burglary defined.—

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, closed vehicle, closed trailer, airplane or railroad car, with intent to commit any theft or any felony, is guilty of burglary.

Idaho Code § 18-1401 (Supp. 1981).

Illinois: *Covered remaining*

Burglary.

§ 19-1. Burglary. (a) A person commits burglary when without authority he knowingly enters or without authority remains within a building, housetrailer, watercraft, * * * or any part thereof,

with intent to commit therein a felony or theft.
* * *

Ill. Rev. Stat. ch. 38, para. 19-1(a) (1983).

Indiana: *Entry only*

Burglary.—

A person who breaks and enters the building or structure of another person, with intent to commit a felony in it, commits burglary, a class C felony.
* * *

Ind. Code Ann. § 35-43-2-1 (Burns Supp. 1984).

Iowa: *Covered remaining*

Burglary defined.

Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.

Iowa Code § 713.1 (1985).

Kansas: *Covered remaining*

Burglary.

Burglary is knowingly and without authority entering into or remaining within any building, mobile home, tent or other structure, or any motor vehicle, aircraft, watercraft, railroad car or other means of

conveyance of persons or property, with intent to commit a felony or theft therein.

Kan. Stat. Ann. § 21-3715 (Supp. 1980).

Kentucky: *Covered remaining*

Burglary in the third degree.—

(1) A person is guilty of burglary in the third degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building.

Ky. Rev. Stat. Ann. § 511.040(1) (Michie 1985).

Louisiana: *Entry only*

Simple burglary

Simple burglary is the unauthorized entering of any dwelling, vehicle, watercraft, or other structure, movable or immovable, with the intent to commit a felony or any theft therein, other than as set forth in Section 60.

* * * * *

La. Rev. Stat. Ann. § 14:62 (West 1986).

Maine: *Covered remaining*

Burglary

1. A person is guilty of burglary if he enters or surreptitiously remains in a structure, knowing that he is not licensed or privileged to do so, with the intent to commit a crime therein.

Me. Rev. Stat Ann., tit. 17-A, § 401(1) (West 1983).

Maryland: *Entry only*

Breaking dwelling with intent to steal or commit felony.

(a) Every person, his aiders, abettors and counsellors, who shall break and enter any dwelling house in the nighttime with the intent to steal, take or carry away the personal goods of another of any value therefrom shall be deemed a felon, and shall be guilty of the crime of burglary.

Md. Ann. Code art. 27, § 30(a) (1982).

Massachusetts: *Entry only*

Burglary, Not Being Armed, etc.

Section 15. Whoever breaks and enters a dwelling house in the night time, with the intent mentioned in the preceding section, or, having entered with such intent, breaks such dwelling house in the night time, the offender not being armed, nor arming himself in such house, with a dangerous weapon, nor making an assault upon a person lawfully therein, shall be punished * * * .

Mass. Gen. L. ch. 266, § 15 (1986).

Michigan: *Entry only*

Breaking and entering.

Sec. 110. Any person who shall break and enter with intent to commit any felony, or any larceny therein, any tent, hotel, office, store, shop, warehouse, barn, granary, factory or other building, structure, boat or ship, railroad car or any private apartment in any of such buildings or any unoccupied dwelling

house, shall be guilty of a felony punishable by imprisonment in the state prison not more than 10 years. * * *

Mich. Comp. Laws § 750.110 (1981).

Minnesota: *Covered remaining*

BURGLARY.

Subdiv. 3. **Burglary in the third degree.** Whoever enters a building without consent and with intent to steal or commit any felony or gross misdemeanor commits burglary in the third degree.

Minn. Stat. § 609.582(3) (1986).

DEFINITIONS.

Subdiv. 4. **Enters a building without consent.** "Enters a building without consent" means:

(a) to enter a building without the consent of the person in lawful possession;

(b) to enter a building by using artifice, trick, or misrepresentation to obtain consent to enter from the person in lawful possession; or

(c) to remain within a building without the consent of the person in lawful possession.

* * * * *

Minn. Stat. § 609.581(4) (1986).

Mississippi: *Entry only*

Burglary—breaking and entering dwelling.

Every person who shall be convicted of breaking and entering any dwelling house, in the day or night, with intent to commit a crime, shall be guilty of burglary, and be imprisoned in the penitentiary not more than ten years.

Miss. Code Ann. § 97-17-19 (1973).

Missouri: *Covered remaining*

Burglary in the second degree.—

1. A person commits the crime of burglary in the second degree when he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein.

Mo. Rev. Stat. § 569.170(1) (1986).

Montana: *Covered remaining*

Burglary.

(1) A person commits the offense of burglary if he knowingly enters or remains unlawfully in an occupied structure with the purpose to commit an offense therein.

Mont. Code Ann. § 45-6-204(1) (1985).

Nebraska: *Entry only*

Burglary; penalty

(1) A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value.

Neb. Rev. Stat. § 28-507(1) (1985).

Nevada: *Entry only*

Definition; punishent; venue.

1. Every person who, either by day or night, enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, vehicle, vehicle trailer, semitrailer or housetrailer, airplane, glider, boat or railroad car, with intent to commit grand or petit larceny, or any felony, is guilty of burglary.

Nev. Rev. Stat. Ann. § 205.060(1) (Michie 1986).

New Hampshire: *Entry only*

Burglary.

I. A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied section thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter. * * *

N.H. Rev. Stat. Ann. § 635:1(I) (1986).

New Jersey: *Covered remaining*

Burglary

a. Burglary defined. A person is guilty of burglary if, with purpose to commit an offense therein he:

(1) Enters a structure, or a separately secured or occupied portion thereof, unless the structure was at the time open to the public or the actor is licensed or privileged to enter;

(2) Surreptitiously remains in a structure or a separately secured or occupied portion thereof knowing that he is not licensed or privileged to do so.

N.J. Stat. Ann. § 2C:18-2(a) (West 1982).

New Mexico: *Entry only*

Burglary.

Burglary consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable, with the intent to commit any felony or theft therein.

* * * * *

N.M. Stat. Ann. § 30-16-3 (Michie 1978).

New York: *Covered remaining*

Burglary in the third degree

A person is guilty of burglary in the third degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein.

* * * * *

N.Y. Penal Law § 140.20 (McKinney 1975).

North Carolina: *Entry only*

First and second degree burglary.

There shall be two degrees in the crime of burglary as defined at the common law. If the crime be committed in a dwelling house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling house or sleeping apartment at the time of the commission of such crime, it shall be burglary in the first degree. If such crime be committed in a dwelling house or sleeping apartment not actually occupied by anyone at the time of the commission of the crime, or if it be committed in any house within the curtilage of a dwelling house or in any building not a dwelling house, but in which is a room used as a sleeping apartment and not actually occupied as such at the time of the commission of the crime, it shall be burglary in the second degree. * * *

N.C. Gen. Stat. § 14-51 (1986).

North Dakota: *Covered remaining*

Burglary.

1. A person is guilty of burglary if he willfully enters or surreptitiously remains in a building or occupied structure, or a separately secured or occupied portion thereof, when at the time the premises are not open to the public and the actor is not licensed, invited, or otherwise privileged to enter or remain as the case may be, with intent to commit a crime therein.

N.D. Cent. Code § 12.1-22-02(1) (1985).

Ohio: *Covered remaining*

Burglary.

(A) No person, by force, stealth, or deception, shall trespass in an occupied structure as defined in section 2909.01 of the Revised Code, or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense as defined in section 2913.01 of the Revised Code, or any felony.

Ohio Rev. Code Ann. § 2911.12(A) (Anderson Supp. 1985).

Oklahoma: *Entry only*

Burglary in the second degree—Acts constituting

Every person who breaks and enters any building or any part of any building, room, booth, tent, railroad car, automobile, truck, trailer, vessel or other structure or erection, in which any property is kept, or

breaks into or forcibly opens, any coin-operated or vending machine or device with intent to steal any property therein or to commit any felony, is guilty of burglary in the second degree.

Okla. Stat. Ann. tit. 21, § 1435 (West 1983).

Oregon: *Covered remaining*

Burglary in the second degree.

(1) A person commits the crime of burglary in the second degree if he enters or remains unlawfully in a building with intent to commit a crime therein.

Or. Rev. Stat. § 164.215(1) (1983).

Pennsylvania: *Entry only*

Burglary

(a) **Offense defined.**—A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with intent to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter.

18 Pa. Cons. Stat. Ann. § 3502(a) (1983).

Rhode Island: *Entry only*

Burglary.—

Every person who shall commit burglary shall be imprisoned for life or for any term not less than five (5) years.

R.I. Gen. Laws § 11-8-1 (1981).

South Carolina: *Entry only*

Burglary; third degree.

(A) A person is guilty of burglary in the third degree if the person enters a building without consent and with intent to commit a crime therein.

S.C. Code Ann. § 16-11-313(A) (Law. Co-op. Supp. 1985).

South Dakota: *Covered remaining*

Third degree burglary defined—Felony.

Any person who enters or remains in an unoccupied structure, with intent to commit any crime therein, is guilty of third degree burglary. * * *

S.D. Codified Laws § 22-32-8 (1979).

Tennessee: *Entry only*

Burglary generally.—

(a) Burglary is the breaking and entering into a dwelling house, or any other house, building, room or rooms therein used and occupied by any person or persons as a dwelling place or lodging either permanently or temporarily and whether as owner, renter, tenant, lessee or paying guest, by night, with intent to commit a felony.

Tenn. Code Ann. § 39-3-401(a) (1982).

Texas: *Covered remaining*

Burglary

(a) A person commits an offense if, without the effective consent of the owner, he:

(1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony or theft; or

(2) remains concealed, with intent to commit a felony or theft, in a building or habitation; or

(3) enters a building or habitation and commits or attempts to commit a felony or theft.

Tex. Penal Code Ann. § 30.02(a) (West. 1974).

Utah: *Covered remaining*

Burglary.—

(1) A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person.

Utah Code Ann. § 76-6-202(1) (1978).

Vermont: *Covered remaining*

Burglary

(a) A person is guilty of burglary if he enters any building or structure knowing that he is not licensed or privileged to do so, with the intent to commit a felony, petit larceny, simple assault or unlawful mischief. This provision shall not apply to a licensed or privileged entry, or to an entry that takes place while

the premises are open to the public, unless the person, with the intent to commit a crime specified in this subsection, surreptitiously remains in the building or structure after the license or privilege expires or after the premises no longer are open to the public.

Vt. Stat. Ann. tit. 13, § 1201(a) (Supp. 1982).

Virginia: *Entry only*

Burglary; how punished.—

If any person break and enter the dwelling house of another in the nighttime with intent to commit a felony or any larceny therein, he shall be guilty of burglary, punishable as a Class 3 felony; provided, however, that if such person was armed with a deadly weapon at the time of such entry, he shall be guilty of a Class 2 felony.

Va. Code Ann. § 18.2-89 (Michie 1982).

Washington: *Covered remaining*

Burglary in the second degree.

(1) A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle.

Wash. Rev. Code. § 9A.52.030(1) (1985).

Inference of intent.

In any prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime

against a person or property therein, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent.

Wash. Rev. Code. § 9A.52.040 (1985).

West Virginia: *Entry only*

Burglary; entry of of dwelling; outhouse; penalties.

(a) * * * If any person shall, in the nighttime, break and enter, or enter without breaking, or shall, in the daytime, break and enter, the dwelling house, or an outhouse adjoining thereto or occupied therewith, of another, with intent to commit a felony or any larceny therein, he shall be deemed guilty of burglary.

(b) If any person shall, in the daytime, enter without breaking a dwelling house, or an outhouse adjoin thereto or occupied therewith, of another, with intent to commit a felony or any larceny therein, he shall be deemed guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than one nor more than ten years.

W. Va. Code Ann. § 61-3-11(a)-(b) (Michie 1977).

Wisconsin: *Entry only*

Burglary

(1) Whoever intentionally enters any of the following places without the consent of the person in lawful possession and with intent to steal or commit a felony in such place is guilty of a Class C felony:

(a) Any building or dwelling; or

(b) An enclosed railroad car; or

(c) An enclosed portion of any ship or vessel; or

(d) A locked enclosed cargo portion of a truck or trailer; or

(e) A motor home or other motorized type of home or a trailer home, whether or not any person is living in any such home; or

(f) A room within any of the above.

Wisc. Stat. Ann. § 943.10(1) (West 1982).

Wyoming: *Covered remaining*

Burglary; aggravated burglary; penalties.

(a) A person is guilty of burglary if, without authority, he enters or remains in a building, occupied structure or vehicle, or separately secured or occupied portion thereof, with intent to commit larceny or a felony therein.

Wyo. Stat. Ann. § 6-3-301(a) (Supp. 1986).

No. 17-778

In the Supreme Court of the United States

JAMAR ALONZO QUARLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF

The government relies almost exclusively on a single argument: that the "ordinary meaning" of "remaining" can *only* refer to "continuous activity." U.S. Br. 13. Thus, the government concludes, trespasses followed by later formation of criminal intent unambiguously constitute "remaining * * * with intent" under *Taylor* v. *United States*, 495 U.S. 575 (1990). But its view that *Taylor*'s plain language *mandates* that position is impossible to square with the Seventh, Eighth, and en banc Fifth Circuit decisions correctly rejecting that acontextual and ahistorical reading. See *Van Cannon* v. *United States*, 890 F.3d 656, 664-665 (7th Cir. 2018) (Sykes, J.); *United States* v. *Herrold*, 883 F.3d 517, 531-536 (5th Cir. 2018) (en banc); *United States* v. *McArthur*, 850 F.3d 925, 939 (8th Cir. 2017) (Colloton, J.). The issue here is not simply the definition of "remaining," but the scope of "burglary" in the Armed Career Criminal Act ("ACCA"), and what *Taylor* meant in defining "generic burglary" for purposes of a harsh 15-year mandatory-minimum prison sentence against the backdrop of contemporaneous state laws, commentary, and centuries of common-law precedent.

That question cannot be answered by reading one word from *Taylor* in isolation, or cherry-picking a few dictionaries. Cf. U.S. Br. 13, 15. Rather, the Court should read *Taylor* in context, and in light of the sources on which it relied. Those authorities demonstrate that at the time of ACCA's amendment and *Taylor*, burglary had long been understood to mean a trespass *for the purpose of committing a crime*. The government cannot show that, by including a "remaining

in" variant, *Taylor* intended to deviate, dramatically and silently, from an understanding of "contemporaneous intent" traditionally considered the "essence"[1] and "most fundamental character"[2] of burglary.[3]

I. *TAYLOR* REQUIRES CRIMINAL INTENT AT INITIAL TRESPASS

1. Because Congress "presumably had in mind at least the 'classic' common-law definition," *Taylor*, 495 U.S. at 593, the analysis here appropriately begins—but does not end, *id.* at 592-596—with common-law burglary. The government does not dispute that intent to commit another crime at the moment of initial trespass was a fundamental element of common-law burglary. Nor could it, given the broad range of authorities showing that "if [the intent to commit another offense] is conceived for the first time after entry, and carried out, the crime [of common-law burglary] is not committed." William L. Clark, Jr., *Hand-Book of Criminal Law* 238 (1894); accord Opening Br. 18-22.

This deep-rooted common-law heritage is fatal to the government's case. The government contends that because the word "remaining" *can* refer to continuous activity, *Taylor*'s generic-burglary definition unambiguously *must* include situations where "the intent [to commit a crime] is formed at any time while the intruder remains." U.S. Br. 13. That view ignores the

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[1] *Van Cannon*, 890 F.3d at 665 (citation omitted).

[2] *United States* v. *Bernel-Aveja*, 844 F.3d 206, 218 (5th Cir. 2016) (Higginbotham, J., concurring in judgment).

[3] Although the government strains to redefine "contemporaneous intent," *e.g.*, U.S. Br. 12, Quarles uses that phrase in the sense traditional to burglary—i.e., intent at the time of initial trespass, *e.g.*, Opening Br. 2.

importance that common-law burglary, as a special form of "attempt" crime (Opening Br. 21-22), placed on the existence of criminal intent at the trespass's commencement. For centuries, it has been understood that the "purpose underlying the crime of burglary * * * is to punish trespass *for the purpose of committing a crime.*" *In re J.N.S.*, 308 P.3d 1112, 1118 (Or. Ct. App. 2013) (emphasis added).

Quarles's position respects this foundational justification for defining a crime of burglary. When viewed against the common-law backdrop, *Taylor*'s generic-burglary definition is naturally read to require criminal intent at the commencement of trespass, whether that occurs through "entry" or "remaining." By that reading, *Taylor* incrementally expanded the common-law crime to capture a limited category of cases where an individual lawfully enters but later trespasses for the purpose of committing a crime. See 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13(b), at 468 (1986) (LaFave & Scott (1986)) ("makes great sense" to extend burglary to "bank customer who hides" until closing and "then takes the bank's money"). *Taylor*'s "remaining" variant modestly "broaden[ed] the definition of criminal trespass"; it did not "eliminate the requirement that the act constituting criminal trespass be accompanied by contemporaneous intent to commit a crime." *People* v. *Gaines*, 546 N.E.2d 913, 915 (N.Y. 1989) (in adopting "remaining" theory, legislature "was plainly addressing * * * unauthorized remaining * * * after lawful entry").

Nothing in *Taylor* or its historical context suggests this Court intended the government's revolutionary break from the common law, which renders irrelevant a defendant's intent as he begins trespassing. Under

that view, committing a misdemeanor any time during a trespass constitutes "burglary." There is nothing "arcane," "esoteric," or "hairsplitting" (U.S. Br. 9, 11-12, 28) about respecting the centuries-old distinction between trespass for the purpose of committing a crime (burglary) and unplanned crimes of opportunity while trespassing (not burglary). Indeed, the existence of preformed criminal intent is the primary basis for "classifying burglary as [an offense] separate" from, and punished "more serious[ly]" than, trespass. *Gaines*, 546 N.E.2d at 915.

2. The syntax of *Taylor*'s generic-burglary definition confirms what more than a dozen circuit judges have concluded: *Taylor*'s "remaining" prong is "natural[ly] * * * read[]" as "captur[ing] burglars who initially have a license to enter a particular location but who remain there once that license expires *in order to commit a crime*." *Herrold*, 883 F.3d at 532 (emphasis added); accord *McArthur*, 850 F.3d at 939 ("most natural reading"). *Taylor*'s definition requires "an unlawful or unprivileged * * * remaining" to coincide "with intent to commit a crime." 495 U.S. at 598. It hardly strains ordinary usage to require the "intent" to coincide with the moment when the "remaining" becomes "unlawful or unprivileged." That reading is particularly reasonable given that this Court paired "remaining" with an "entry" prong that all agree requires intent at the first moment of trespass. See U.S. Br. 12-13; see also, *e.g.*, *Neal* v. *Clark*, 95 U.S. 704, 708-709 (1877) (in construing two-word phrase, "coupling of words together shows that they are to be understood in the same sense" (citation omitted)); *Bullock* v. *Bank-Champaign, N.A.*, 569 U.S. 267, 273-275 (2013) (approving *Neal*).

The government's own examples demonstrate that when the word "remaining" is paired with a modifying phrase (here, "with intent to commit a crime"), one naturally expects the modifying condition to exist *at the commencement* of "remaining." If, after missing a day of work, an employee tells his boss that he had remained home "with a cough" (U.S. Br. 13-14), the employer would surely feel misled if she later discovered the employee skipped work to host a party, and developed the cough only mid-afternoon from cigar smoke. The employee's statement naturally conveyed that the modifying condition (cough) existed *when he decided to stay home*, not that it developed later. Similarly, the contrived phrase "peaceful remaining" (*id.* at 13) does not describe a protest that began violently and quieted only after the protesters were physically restrained.

The government's position saps the "entry" prong of virtually all independent force, since "almost every instance" of unlawful entry with intent is immediately followed by unlawful remaining with intent. *Herrold*, 883 F.3d at 532; see also Opening Br. 16-17. Whether or not "entry" would be entirely redundant, see U.S. Br. 16-18, the government cannot deny its reading of "remaining" leaves the "entry" prong with little-to-no work to do in the mine run of cases.[4] Cf. *Corley* v. *United States*, 556 U.S. 303, 314 (2009) ("basic interpretive canon[]" is construing statutes "so that no part will be * * * insignificant"). The government's selective protest against reading *Taylor* "like a statute," U.S. Br. 16, rings hollow, given its own analysis doing

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[4] The government dwells on alleged conduct associated with Quarles's home-invasion conviction, see U.S. Br. 17-18, but Quarles pleaded "no contest" without admitting the alleged facts, see J.A. 26; R.26-1 at 142, 147.

precisely that, see *id.* at 11-15, 38 (seeking "plain-English application of *Taylor*"). The government's resistance to the surplusage canon also ignores that *Taylor*'s generic-burglary definition borrowed heavily from the 1984 version of ACCA. See *Taylor*, 495 U.S. at 598-599.

After centuries of burglary law focused on the moment of "entry," it would be surprising if *Taylor*—without acknowledgment or explanation—implicitly adopted an expansive "remaining" theory that rendered "entry" burglary irrelevant in all but a handful of cases. See *Herrold*, 883 F.3d at 532 (government "puts entry almost entirely out of focus"). Neither Congress nor this Court would have hidden that elephant in the "remaining" mousehole. Cf. *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). It is far more likely that *Taylor* viewed "remaining" burglary as an incremental modification retaining the age-old requirement of trespass *for the purpose of committing a crime*. In fact, that is precisely how the contemporaneous sources central to *Taylor* explained the change: i.e., "captur[ing] defendants who lawfully enter a location and then remain, once their license to be there is lost, in order to commit a crime." *Herrold*, 883 F.3d at 532-533 (citing LaFave & Scott § 8.13(b), at 468 (1986), and American Law Institute, Model Penal Code § 221.1, cmt. (3) (Official Draft and Revised Comments 1980) (Model Penal Code (1980))).

The government's invocation of *United States* v. *Cores*, 356 U.S. 405 (1958)—supposedly central to the meaning of "remaining," yet never cited below—is misplaced. *Cores* held that a foreign crewman who "willfully remains" in the country beyond the time authorized in his permit commits "a continuing offense," and

can be prosecuted in the district where he is apprehended, not only where he first overstayed. *Id.* at 408-409. *Cores* lacks the features relevant here—e.g., the pairing of "remaining" with a point-in-time "entry" prong, in defining an offense that for centuries has required proof of intent at initial trespass.[5] *Cores* does not show that "the plain language of *Taylor*" "unambiguously encompasses" a trespasser who develops intent to commit a crime after unlawfully entering or remaining. U.S. Br. 11.[6]

II. CONTEMPORANEOUS STATE PRACTICE DEFEATS THE GOVERNMENT'S MAXIMALIST READING OF *TAYLOR*

By starting with its acontextual definition of "remaining," the government effectively rewrites the analytical framework *Taylor* requires—i.e., calibrating a generic-burglary definition to how "most States" at the time of ACCA's enactment defined "burglary." 495 U.S. at 598. For good reason: in conducting the inquiry *Taylor* actually requires, the government begins at a huge deficit, given its concession that 22 jurisdictions required criminal intent at the time of initial

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[5] Because common-law trespass and statutory analogues like 18 U.S.C. § 1752(a)(1) do not require proof of intent to commit another crime, they do not support the government. See U.S. Br. 15; see also 3 Charles E. Torcia, *Wharton's Criminal Law* § 332, at 302 (15th ed. 1993). While 18 U.S.C. § 2118(b) (Supp. III 1985) (cited at U.S. Br. 21) recognizes "ent[ry]" and "remain[ing]" burglary theories, neither party has identified any decision applying that statute where a defendant lacked "the intent to steal" when he "enter[ed]" or first "remain[ed]" "without authority."

[6] Even if "'remains' permits no connotation other than continuing presence," *Cores*, 356 U.S. at 408, that does not address when the "intent to commit a crime" must begin under *Taylor*'s generic-burglary definition, 495 U.S. at 598.

trespass, by recognizing only "entry" liability. See U.S. Br. 34. Nor can the government seriously dispute that many other states' laws either *on their face* required proof of intent at initial trespass, or have been so construed by courts.

A. "Entry-Only" States Are Central To The Question Presented

In addressing state practice, the government's key analytical step consists of a single sentence, bereft of authority. After acknowledging that 22 jurisdictions in 1986 "did not prohibit 'remaining' at all," the government simply asserts that because *Taylor* included a "remaining" variant, "the laws and court decisions in [entry-only] jurisdictions * * * shed no meaningful light" here. U.S. Br. 34-35. But the government cannot so easily sweep aside almost half the nation's laws, because *Taylor* aligned its generic-burglary definition with "the criminal codes of *most States*," *Taylor*, 495 U.S. at 598 (emphasis added), not a subset of states.

Under *Taylor*'s inclusive approach, the fact that nearly half of all jurisdictions recognized only "entry" burglary is highly relevant. By requiring intent at entry, those state laws foreclose the government's position that burglary occurs whenever intent forms, even if long after the initial trespass. The sheer number of entry-only jurisdictions shows that, at the time of ACCA and *Taylor*, it was widely understood that "the most fundamental character of burglary" is "that the perpetrator trespass while already harboring intent to commit a further crime." *United States* v. *Bernel-Aveja*, 844 F.3d 206, 218 (5th Cir. 2016) (Higginbotham, J., concurring in judgment); accord *Van Cannon*, 890 F.3d at 665. By contrast, the government

proposes a lowest-common-denominator approach maximizing ACCA's sweep, not a generic definition faithful to "most" states' laws. *Taylor*, 495 U.S. at 598.

In the government's view, ACCA "used the term 'burglary' to describe a somewhat variegated, but thematically coherent, set of laws." U.S. Br. 10-11. But only Quarles's position ensures "thematic[] coheren[ce]," by understanding "remaining" burglary as incrementally modifying the longstanding entry-only rule, to capture individuals who lawfully enter a structure but unlawfully remain to commit a crime. The unifying theme is *trespassing for the purpose of committing a crime.*

The government's broader definition, by contrast, assembles a motley collection of state laws lacking any coherence. What theme unifies a law requiring criminal intent upon entry, and another extending to the commission of any crime while trespassing? If the supposedly unifying theme is merely *trespassing and forming intent, at some point, to commit a crime*, then the laws of the 22 entry-only jurisdictions were massively and arbitrarily underinclusive.

B. Most "Remaining" Burglary States Required Proof Of Trespass To Commit A Crime

Instead of asking how states with "remaining" burglary variants have *actually* interpreted their laws, the government stakes out a strange position. It argues that "the plain meaning" of "remaining" statutes necessarily encompassed intent formed any time after trespass. U.S. Br. 19. Thus, the government argues, Congress necessarily had that supposed "plain meaning" in mind when it enacted ACCA, even though

numerous state courts have read those same burglary statutes as *foreclosing* the government's interpretation. See U.S. Br. 21-23. Effectively, the government contends that Congress (and *Taylor*) adopted a maximalist definition of a predicate offense for a harsh 15-year minimum sentence, based on a misunderstanding of state law, and driven by a mistaken conviction that state "remaining" statutes have a single, inescapable plain meaning consistent with the government's position here.

The linchpin of the government's argument is its contention that, as of 1986, no judicial decisions in states with "remaining" burglary statutes "squarely foreclosed liability" for intent formed after initial unlawful remaining. U.S. Br. 21. That argument fails, for several reasons.

1. The government's basic position is that state "remaining" statutes have a single, plain meaning. U.S. Br. 19. Yet the government does not dispute that in at least seven states that had "remaining" burglary statutes in 1986, courts have interpreted those laws to require proof of burglarious intent when the trespass began. See U.S. Br. 35, 37 (listing Alaska, Colorado, Delaware, Hawaii, Minnesota, and New York); see also Opening Br. 41 (discussing *State* v. *Nieves*, A-2010-11T4, 2014 WL 886810, at *3 (N.J. Super. Ct. App. Div. Mar. 7, 2014), which government ignores). That alone defeats the idea that "a plain-English application" of "remaining" statutes "substantially identical" to *Taylor*'s generic-burglary definition "unambiguously encompasses" an intruder who forms the intent to commit a crime only after his trespass began. U.S. Br. 11, 20, 38; cf., *e.g.*, *Cooper* v. *People*, 973 P.2d 1234, 1240 (Colo. 1999) (en banc) (interpreting "plain language of

the Colorado burglary statute to require that * * * the defendant intended to commit a crime inside at the moment he first became a trespasser"). Even if decided after 1986, those cases contradict the suggestion that Congress necessarily would have understood state "remaining" statutes to have a single, plain meaning in line with the government's position.[7]

2. The fact that legislators in Colorado, Delaware, and Hawaii felt the need to modify their 1986-era "remaining" statutes to abrogate an intent-at-initial-trespass rule, see U.S. Br. 37, supports Quarles's argument, not the government's.[8] The government concedes that 1986 burglary statutes in those states were "substantially identical on their face to *Taylor*'s formulation." *Id.* at 20. Yet changes to those statutes' text

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[7] That a few intermediate state appellate courts issued pre-1986 decisions broadly interpreting "remaining" burglary, U.S. Br. 21-22, merely shows that plain language does not *foreclose* the government's reading; it hardly establishes that interpretation as the best—much less only reasonable—reading. Illustrating this point, the Oregon Court of Appeals no longer follows *State* v. *Papineau*, 630 P.2d 904, 906-907 (Or. Ct. App. 1981), instead requiring criminal intent at the trespass's commencement. See Opening Br. 50-51; accord U.S. Br. 24 n.2.

The government also errs (U.S. Br. 21) by equating "remaining" burglary statutes with Texas's extreme minority approach, which defined burglary in relevant part without using the word "remaining," and effectively eliminated the intent requirement. See Fed. Pub. Defenders Amicus Br. 8.

[8] Hawaii's legislature modified the intent-at-initial-trespass rule for unlawful *entry*, not lawful entry followed by unlawful *remaining*. See *State* v. *Richardson*, No. CAAP-13-0005778, 2015 WL 405735, at *2 (Haw. Ct. App. Jan. 30, 2015).

were required to abrogate an intent-at-initial-trespass rule.[9]

3. The government's flawed headcount of state laws in 1986 ignores significant pre-1986 evidence that several "remaining" burglary states required proof of criminal intent at the initiation of trespass. The government does not seriously dispute that the text and history of 1986-era burglary statutes in Maine, Missouri, and Vermont required criminal intent at initial trespass. See Opening Br. 35-36, 38-39, 44 & n.18. Statutes in Minnesota likewise treated "remaining" as a discrete moment in time, by codifying that theory as part of the definition of the phrase "enters a building without consent." See *id.* at 37. And when the Alaska Court of Appeals held in 1988 that the state's burglary laws required intent "at the time [a defendant's] presence on the premises first became unlawful," *Shetters* v. *State*, 751 P.2d 31, 36 n.2 (Alaska Ct. App. 1988), it considered that interpretation *compelled* by its pre-1986 decision in *Arabie* v. *State*, 699 P.2d 890 (Alaska Ct. App. 1985). See also pp. 14-15, *infra* (discussing pre-1986 New York authority).

4. The government is also wrong that decisions from Arkansas, Connecticut, Illinois, Maine, and North Dakota (most predating 1986) are relevant only to "entry" liability. See U.S. Br. 35-37. Courts in those states have indicated that "unlawful entry" and

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[9] The government does not dispute that Montana's 2009 statutory amendments show the state's *Taylor*-era burglary statutes required proof of intent at the time of unlawful entry or first unlawful remaining. Opening Br. 39 n.15; see also *Herrold*, 883 F.3d at 534 n.107 (listing Montana among states that had adopted intent-at-initial-trespass rule by time of *Taylor*).

"unlawful remaining" are mutually exclusive theories.[10] Therefore, under the laws of these states effective in 1986, a defendant who *unlawfully* entered a building without criminal intent could not be convicted of burglary, even if he subsequently developed criminal intent while trespassing. That rule forecloses the government's position here. See U.S. Br. 7.

That these states required criminal intent at the moment of initial trespass in unlawful-entry cases strongly suggests that they would similarly require intent at the moment of initial trespass where a defendant lawfully entered but then unlawfully remained. It would be idiosyncratic, to say the least, to treat later-arising criminal intent as irrelevant for defendants who unlawfully enter, but as triggering a burglary conviction for defendants who *lawfully* enter, unlawfully remain, and later form criminal intent. There is no

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[10] See *Hickerson* v. *State*, 667 S.W.2d 654, 656 (Ark. 1984) (reversing burglary conviction due to insufficient evidence of criminal intent upon unlawful entry, although defendant subsequently kidnapped minor inside); *State* v. *Belton*, 461 A.2d 973, 976 (Conn. 1983) ("[T]o remain unlawfully contemplates an initial legal entry which becomes unlawful."); *People* v. *Green*, 404 N.E.2d 930, 932 (Ill. App. Ct. 1980) ("statute provides two alternative ways to commit burglary"); *State* v. *Field*, 379 A.2d 393, 395 (Me. 1977) (defendant who "makes an unauthorized entry * * * *must then* entertain actual intent to commit a specific crime" (emphasis added)); accord *State* v. *One 1990 Chevrolet Pickup*, 523 N.W.2d 389, 395 (N.D. 1994) (no burglary if theft committed after unlawfully entering "only out of curiosity and without intent to steal"); cf. *Young* v. *State*, 266 S.W.3d 744, 750 (Ark. 2007) (affirming conviction where defendant lawfully entered but unlawfully remained, and evidence showed criminal intent at time of initial unlawful remaining).

apparent reason for penalizing *lawful* entry more harshly than *unlawful* entry.

5. The government also makes no effort to reconcile its focus on pre-1986 judicial decisions, with its talismanic reliance on the use of "remaining" in this Court's May 1990 *Taylor* decision.[11] (As all agree, Congress omitted any burglary definition from the 1986 ACCA amendments.) Two years before *Taylor*, the Alaska Court of Appeals held that "remaining" burglary required intent at the time of initial trespass. *Shetters*, 751 P.2d at 36 n.2. And seven months before *Taylor*, the New York Court of Appeals read "remaining" burglary to require proof that "the act constituting criminal trespass [was] accompanied by contemporaneous intent to commit a crime." *Gaines*, 546 N.E.2d at 915. New York's burglary statutes were "particularly influential," *Herrold*, 883 F.3d at 533 & n.101, serving as a model for many states, see Model Penal Code § 221.1, commentary, p. 71 (1980); see also, *e.g.*, *Cooper*, 973 P.2d at 1238 & n.3, 1240. The key language in New York's burglary statutes, see N.Y. Penal Law §§ 140.20-140.30 (McKinney 2019), is materially indistinguishable from *Taylor*'s generic-burglary definition. The New York high court's pre-*Taylor* interpretation of that state's pathmarking burglary statute forecloses the government's argument that *Taylor*'s plain language compels the government's reading.

In any event, *Gaines* was merely the logical extension of *People* v. *Licata*, 268 N.E.2d 787, 789 (N.Y. 1971), which explained that the "word 'remain' * * * is

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[11] The government itself has successfully invoked post-1986 state decisions in interpreting ACCA. *E.g.*, U.S. Br. at 19, 17a-22a, *Stokeling* v. *United States*, No. 17-5554 (Aug. 2018).

designed to be applicable to cases in which a person enters with 'license or privilege' but remains on the premises after the termination of such license or privilege." Accord *Gaines*, 546 N.E.2d at 915. This statement from *Licata* conflicts with the government's view that an intruder can be convicted of burglary if he remains with criminal intent, after an unlawful entry without intent. And it is a direct quotation from the pre-ACCA practice commentaries on New York's influential burglary laws, see *Licata*, 268 N.E.2d at 789, which further explained that "unlawful entering" is "more common" than "unlawful remaining." N.Y. Penal Law § 140.00, Practice Commentaries, § 5, at 341-342 (McKinney 1967). States modeling their burglary statutes after New York's would presumably have understood them in line with the Practice Commentaries and *Licata*, as further elaborated in *Gaines*.

6. To the extent ambiguity existed in 1986 or at the time of *Taylor* about the scope of state "remaining" burglary statutes, it favors *Quarles*, not the government. See Opening Br. 26 n.4. Given the intent-at-initial-trespass requirement's long common-law pedigree, Congress and the *Taylor* Court naturally would have expected states to resolve ambiguities in favor of retaining that requirement. The ample case law interpreting state "remaining" statutes in precisely that fashion confirms that such an assumption would have been justified.[12]

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[12] Given the common-law backdrop, the government's quibble (U.S. Br. 37) with categorizing Ohio and Utah as "[a]mbiguous," despite their courts' post-1986 departure from the intent-at-initial-trespass rule, is unwarranted. Congress in 1986 would likely have expected Ohio and Utah to ultimately follow the common-law rule.

* * * * *

In sum, among states with "remaining" burglary statutes in 1986, more than half are best understood to have required proof of criminal intent at the moment of initial trespass: Alaska, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Minnesota, Missouri, Montana, New Jersey, New York, North Dakota, and Vermont. With the 22 entry-only jurisdictions, that means *at least* 37 jurisdictions followed the intent-at-initial-trespass rule in 1986. Quarles's position accords with *Taylor*'s stated objective of articulating "the generic sense" in which "burglary" was then "used in the criminal codes of most States." 495 U.S. at 598.

The government nevertheless complains that Quarles's position would "render [ACCA's burglary predicate] inapplicable in many States." U.S. Br. 25 (quoting *Stokeling* v. *United States*, 139 S. Ct. 544, 552 (2019)). But despite its detour into modern burglary laws, see U.S. Br. 23-25, the government wisely refrains from urging a "living ACCA," under which generic burglary would expand over time to reflect changes in state laws, without congressional action. Instead, the government agrees that "burglary" must be interpreted in accordance with the generic understanding in 1986, when ACCA was amended and the 1984 burglary definition was deleted. See Opening Br. 25-26; accord U.S. Br. 19 ("Court has looked to state burglary laws in place * * * in 1986").[13]

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[13] *United States* v. *Castleman*, 572 U.S. 157 (2014), rejected an interpretation that would have rendered the provision there "inoperative in many States *at the time of [the provision's] enactment*." *Id.* at 167 (emphasis added). *Stokeling* cited *Castleman*

The government concedes that, as of 1986, only a handful of state burglary statutes had been interpreted to encompass those who form intent after an initial trespass. See U.S. Br. 23 (listing six). *Taylor* recognized that a "few States' burglary statutes * * * define burglary more broadly" than the generic definition. 495 U.S. at 599; cf. *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1571-1572 (2017) (adopting generic definition of "sexual abuse of a minor" that rendered immigration provision inapplicable to statutory-rape convictions in 16 states). Even if a state's laws contain one or more variants broader than "generic burglary," that would not necessarily disqualify all burglary convictions in that state from serving as ACCA predicates. See *Mathis* v. *United States*, 136 S. Ct. 2243, 2249 (2016); see also, *e.g.*, *United States* v. *Priddy*, 808 F.3d 676, 684 (6th Cir. 2015) (Tennessee's burglary statute is divisible).

III. *TAYLOR*'S OTHER AUTHORITIES SUPPORT QUARLES

Taylor relied on three other sources in defining generic burglary: the 1986 edition of LaFave's *Substantive Criminal Law*, the Model Penal Code, and the 1984 ACCA's burglary definition. The government wrongly dismisses the first two as irrelevant and wrongly claims that the 1984 definition supports its reading.

1. The carefully worded suggestion that LaFave does not "directly" address the question here, U.S. Br. 27, ignores key portions of that treatise. Supporting Quarles's position, LaFave described burglary as

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and focused on the definition of robbery adopted by a "significant majority" of states "[i]n 1986." 139 S. Ct. at 552.

"an intrusion *for a[] criminal purpose.*" LaFave & Scott § 8.13(e), at 474 (1986) (emphasis added) (quoting Model Penal Code § 221.1, commentary, p. 75 (1980)). The treatise's "sole example of ['remaining in'] burglary describe[d] 'a bank customer who hides in the bank until it closes and then takes the bank's money.'" *Herrold*, 883 F.3d at 532-533 (quoting LaFave & Scott § 8.13(b), at 468 (1986)). These statements demonstrate that LaFave understood the purpose of the "remaining" theory as "captur[ing] defendants who lawfully enter a location and then remain, once their license to be there is lost, *in order to commit a crime.*" *Id.* at 532 (emphasis added). In other words, "remaining" burglary captures defendants who possess criminal intent when their trespass commences, but would have otherwise escaped an "entry" burglary conviction because they entered lawfully.

Similarly, LaFave understood Texas's burglary statute (encompassing any trespass followed by commission of a crime) as designed to avoid "the problems of proof concerning whether the defendant's intent was formed before *or after* the unlawful entry *or remaining.*" LaFave & Scott § 8.13(e), at 475 (1986) (emphasis added). That analysis necessarily assumes that *other states'* "remaining in" burglary laws (worded like *Taylor*'s generic-burglary definition, not like Texas's statute) required proof of criminal intent when the unlawful remaining began. "To speak of problems of proof associated with possible intent formation '*after* the unlawful . . . remaining' would be incoherent otherwise—the only way intent can form after 'remaining' in the [continuous] sense would be if it formed after the defendant totally left the premises." *Herrold*, 883 F.3d at 533 (footnote omitted). In stark contrast to the

government's brief, which cites Texas's statute as an exemplar of its broad understanding of "remaining" statutes (U.S. Br. 21), LaFave's treatise viewed Texas's statute "as an '*alternative*' to the ordinary 'unlawful entry or remaining' forms of burglary." *Herrold*, 883 F.3d at 533 (emphasis added) (quoting LaFave & Scott § 8.13(e), at 475 (1986)).

2. The government dismisses the Model Penal Code because it did not adopt a "remaining" theory. U.S. Br. 28. But *Taylor* viewed its generic-burglary definition as "approximat[ing] * * * the Model Penal Code." 495 U.S. at 598 n.8. *Taylor*'s statement can only be accurate if "remaining" burglary was a modest addition that remained faithful to the Code's basic requirement that a purpose to commit another offense "must accompany the intrusion." Model Penal Code § 221.1, commentary, p. 75 (1980). Indeed, the Model Penal Code's commentary understood "remaining" burglary statutes as designed to capture "those who are initially licensed to be on a property but who exceed their license in order to commit a crime." *Herrold*, 883 F.3d at 533; see also Model Penal Code § 221.1, commentary, pp. 69-71 (1980). Far from "approximat[ing]" the Model Penal Code, *Taylor*, 495 U.S. at 598 n.8, the government's position mirrors what the Code's drafters viewed as the "ultimate absurdity"—"making it burglary to commit an offense 'in' a building, regardless of the lawfulness of the actor's entry or *the intent with which he entered*." Model Penal Code § 221.1, commentary, p. 65 (1980) (emphasis added).

3. The government concedes that the 1984 ACCA burglary "definition excluded crimes where intent is formed after the intruder's presence is no longer surreptitious." U.S. Br. 26. That limitation forecloses the

government's rule that intent can be formed any time after an initial trespass. The government suggests the 1984 definition was intended to encompass individuals who form intent to commit a crime during the ongoing act of "remaining surreptitiously," but after the initial trespass. 18 U.S.C. App. § 1202(c)(9) (Supp. III 1985). At bottom, however, that argument adds nothing to the government's isolated focus on "remaining." In fact, since "surreptitiously" connotes the presence of preformed criminal intent, the 1984 definition is more consistent with Quarles's view that criminal intent must exist when the trespass begins. See Nat'l Ass'n of Crim. Def. Lawyers Amicus Br. 9; *Webster's Third New International Dictionary* 2302 (1971) ("surreptitious" means, among other things, "marked or accomplished by fraud").

IV. REQUIRING INTENT WITH INITIAL TRESPASS FURTHERS CONGRESS'S PURPOSE OF RESERVING ACCA'S HARSH PENALTIES FOR VIOLENT CAREER CRIMINALS

Limiting ACCA burglary to cases where an intruder trespasses for the purpose of committing another crime is consistent with congressional design. See Opening Br. 51-55. First, Congress aimed ACCA's harsh 15-year mandatory-minimum sentence at "career offenders * * * who commit a large number of fairly serious crimes as their means of livelihood." *Taylor*, 495 U.S. at 587-588. Individuals who commit unplanned crimes of opportunity while trespassing do not fit that description. The government does not—and cannot—dispute that fundamental point.

Second, individuals who initiate a trespass without intent to commit another crime do not present the increased "threat of harm to persons" that ACCA seeks to address. *Taylor*, 495 U.S. at 587-588. The government contends that burglary "creates the possibility of a violent confrontation," and that the timing of criminal intent has "no bearing on [that] risk." U.S. Br. 29. *Taylor*, however, thought otherwise. In language the government carefully avoids, *Taylor* explained that "[t]he fact that an offender enters a building *to commit a crime* often creates the possibility of a violent confrontation." 495 U.S. at 588 (emphasis added).

Taylor acknowledged what common sense suggests: "Scenarios in which a defendant trespasses but does not intend to commit a crime must engender less risk of confrontation than ones in which he enters *just to commit a crime*." *Herrold*, 883 F.3d at 534. An intruder is more likely to abandon a criminal purpose and flee (not fight) if confronted during a spur-of-the-moment crime, rather than an offense that was his animating purpose for the trespass. An individual who trespasses for the pre-planned purpose of committing a crime is more likely to be "prepared to use violence if necessary to carry out his plans or to escape." *Taylor*, 495 U.S. at 588. Individuals with criminal designs at the trespass's outset are more likely to have brought weapons to assist in achieving their objectives. And individuals with histories of carrying out pre-planned burglaries are more likely to be the type of hardened criminals who would use a weapon "deliberately to harm a victim"—i.e., the dangerous offenders at which ACCA is aimed. *Begay* v. *United States*, 553 U.S. 137, 145 (2008).

The government shifts focus from *the intruder's* culpability and dangerousness to the possibility that a *third party* "will defend himself" or property "through violent force." U.S. Br. 30. But the government fails to explain why—if that were Congress's concern—it included burglary but not trespass among ACCA's enumerated offenses. If an occupant generally will not know whether a trespasser intends to commit other crimes, and will typically assume the worst, occupant-initiated violent confrontations may arise in any trespass, not just when the owner encounters a "criminally-minded intruder." *Id.* at 9. Yet that risk alone was insufficient for Congress to enumerate trespass as an ACCA predicate. Congress understood burglaries to present a materially greater "threat of harm to persons" than mere trespasses. *Taylor*, 495 U.S. at 587-588. It is the presence of preformed criminal intent at the trespass's initiation that increases the offense's potential dangerousness.[14]

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[14] The government downplays its position's harsh consequences by noting that ACCA requires three qualifying convictions. See U.S. Br. 32. But the number of predicate offenses has no logical bearing on what constitutes a predicate offense. Regardless, the government ignores that certain populations, such as the chronically homeless, face increased risk of incurring multiple convictions for non-violent crimes. See, *e.g.*, Stephen Metraux et al., *Incarceration and Homelessness, in Toward Understanding Homelessness: The 2007 National Symposium on Homelessness Research* 9-1, 9-11 (Deborah Dennis et al. ed., 2007), http://bit.ly/2uEpysk; cf. Sentencing Guidelines App. C Supp., Amend. 798 (Aug. 1, 2016) (deleting "burglary of a dwelling" as enumerated crime of violence for career-offender provision, noting "burglary offenses rarely result in physical violence").

V. LENITY AND AVOIDANCE DOCTRINES FORECLOSE THE GOVERNMENT'S POSITION

Ultimately, the government's position is founded on a remarkable supposition: In ACCA, "Congress did not wish to specify an exact formulation that an offense must meet in order to count as 'burglary'"; instead, the government's brief suggests, Congress delegated lawmaking authority to courts to define generic burglary. U.S. Br. 38-39 (quoting *Taylor*, 495 U.S. at 598-599). And Congress did so in a way that, far from requiring consistency with existing laws in most states, was broad enough to encompass potential future expansions of state laws. See *id.* at 23 (arguing that states "could well have"—sometime after ACCA and *Taylor*—"applied their burglary statutes to impose criminal liability in circumstances where intent is formed while unlawfully 'remaining'"). That is effectively a rule of *anti-lenity*, conceding that "burglary" in ACCA is ambiguous, and urging this Court to resolve doubt *against* defendants. That is not how this Court interprets criminal statutes. See *United States* v. *Granderson*, 511 U.S. 39, 54 (1994).

The government's rule of severity would unmoor generic burglary from any objective foundation, effectively allowing ACCA to expand to account for future changes in state practice without congressional action, and depriving defendants of fair notice of what triggers ACCA's harsh penalties. To the extent ambiguity exists, both the rule of lenity and the constitutional-avoidance canon mandate resolution in Quarles's favor. See Opening Br. 29-30.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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No. 17-778

In the Supreme Court of the United States

JAMAR ALONZO QUARLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Recent events confirm the urgent need for this Court to decide the important question presented here—whether generic burglary under *Taylor* v. *United States*, 495 U.S. 575 (1990), requires proof that intent to commit a crime was present at the time of unlawful entry or first unlawful remaining.

This issue was not addressed, much less resolved, by this Court's recent decision in *United States* v. *Stitt*, No. 17-765 (Dec. 10, 2018). Rather, *Stitt* concerned the distinct question whether generic "burglary" under *Taylor* includes "burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation." *Id.*, slip op. 1. This Court concluded in *Stitt* that *Taylor*'s longstanding definition of "the statutory term 'burglary,' govern[ed] * * * and determine[d] the outcome" in that case. *Id.*, slip op. 4. In applying *Taylor*'s definition of burglary to the circumstances of that case, *Stitt* did nothing to affect, never mind settle, the conflict over the definition of burglarious intent.

The latter issue, however, "has divided the courts of appeals" and remains a "frequently recurring question regarding the scope of an important [Armed Career Criminal Act ('ACCA')] predicate." U.S. Br. 7. Since petitioner filed his reply brief, *yet another* federal court of appeals weighed in on this entrenched "circuit split on the correct way to understand *Taylor*'s requirement of burglarious intent." *Van Cannon* v. *United States*, 890 F.3d 656, 665 n.2 (7th Cir. 2018). With the Seventh Circuit's recent decision, the split here is deeper than the one that warranted this

Court's review in *Stitt*. Indeed, courts accounting for approximately 80% of all federal criminal prosecutions have now joined the split.[1]

Also just during the pendency of Quarles' petition, the United States petitioned for a writ of certiorari to review an en banc Fifth Circuit decision raising the same issue. See *United States* v. *Herrold*, 883 F.3d 517, 531-536 (2018), pet. for cert. pending, No. 17-1445 (filed Apr. 18, 2018). However, of the many pending petitions on this issue, Quarles' case offers the Court the best opportunity to resolve this critical ACCA issue without unnecessary procedural complications.

1. Nothing in *Stitt* resolves or even bears on the entrenched circuit split on the burglarious intent question. In addressing the scope of the statutory term "burglary" in the Armed Career Criminal Act, this Court in *Stitt* took its rule of decision directly from *Taylor*, which "defined the elements of generic 'burglary' as 'an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.'" *Stitt*, slip op. 5 (quoting *Taylor*, 495 U.S. at 598). This Court concluded that the state laws at issue in *Stitt* "fall[] within the scope of generic burglary's definition as set forth in *Taylor*." *Ibid.* In so doing, *Stitt* applied *Taylor*'s established test to the circumstances of that case, considering (among other factors) whether a majority of state burglary statutes covered vehicles at the time of ACCA's enactment, and whether entry of vehicles

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[1] See Admin. Office of U.S. Courts, *Statistical Tables for the Federal Judiciary—June 2018*, Table D-3, http://bit.ly/2PzL6T9.

creates a risk of violent confrontation. See *Stitt*, slip op. 5-7. In so doing, this Court gave no indication of modifying *Taylor*'s basic inquiry. Compare *Stitt*, slip op. 5-7, with *Taylor*, 495 U.S. at 589 ("generic" burglary under ACCA "roughly correspond[s] to the definitions of burglary in a majority of the States' criminal codes [when ACCA was enacted]"), and with *id.* at 588 (Congress included "burglary" as ACCA predicate "because of its inherent potential for harm to persons").[2] Thus, *Stitt* did not modify or provide further guidance on the *Taylor* framework under which the burglarious intent split arose.

In addition to the language of this Court's opinion, other considerations show that *Stitt* does not resolve or bear on the *mens rea* requirement implicated here. The burglarious intent issue was not mentioned in the merits briefing or at oral argument in *Stitt*. And decisions of courts of appeals that have addressed both questions confirm that the issues are analytically distinct. For instance, in addressing the intent issue, the Seventh Circuit's recent decision in *Van Cannon* made no mention of the dwellings issue, although that court had resolved the dwellings question only five months earlier in an opinion joined by *Van Cannon*'s author (Judge Sykes). See *Van Cannon*, 890 F.3d 656;

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[2] *Stitt* also addressed other arguments that have no bearing on the intent question presented here, including issues specific to the state statutes in that case, see *Stitt*, slip op. 7, and whether this Court's references to "nontypical structures and vehicles" in *Taylor*, *Mathis* v. *United States*, 136 S. Ct. 2243, 2250 (2016), and other cases had resolved the vehicle question, see *Stitt*, slip op. 7-8.

see also *Smith* v. *United States*, 877 F.3d 720, 725 (7th Cir. 2017). The Sixth Circuit reached a similar conclusion regarding the lack of relationship between the two issues. See Pet. 15-16 & n.9.

The continuity between *Taylor* and *Stitt* is underscored by the fact that existing lower-court opinions addressing the intent question consider and apply the same *Taylor* factors this Court applied in *Stitt*. *E.g.*, *Herrold*, 883 F.3d at 533-534 & nn. 99-103, 107 (analyzing whether state-law definitions of burglary at the time of ACCA's enactment included a contemporaneous-intent requirement, and addressing potential for "danger to victims"); *United States* v. *McArthur*, 850 F.3d 925, 939 (8th Cir. 2017) (addressing contemporaneous meaning of "burglary" in same versions of treatise and Model Penal Code cited in *Taylor*). Nothing in *Stitt* affects the *Taylor* analysis in a manner that would justify deferring resolution of this entrenched circuit split—a split that continues to cause sentencing disparities nationwide.

2. Even in the short time since Quarles filed his petition, the circuit split has continued to deepen. Most recently, the Seventh Circuit in *Van Cannon* addressed whether Minnesota's second-degree burglary offense constitutes "generic burglary" and thus is an ACCA predicate offense. Endorsing the very position Quarles advocates, the court concluded it does not. Although the statute at issue there covers what is plainly "generic burglary: A person * * * 'enters a building without consent and with intent to commit a crime,'" it also encompasses an offense that "is not" generic burglary: "A person can be convicted of this

same crime if he 'enters a building without consent and commits a crime while in the building.'" 890 F.3d at 664 (quoting Minn. Stat. § 609.582(2)(a)). The Seventh Circuit explained that "[c]ontemporaneous intent was the essence of burglary at common law," and that view continued to prevail at the time of *Taylor*. *Id.* at 665 (quoting *United States* v. *Bonilla*, 687 F.3d 188, 196 (4th Cir. 2012)). The court noted that the secondary sources *Taylor* relied upon—the relevant editions of the LaFave and Scott *Substantive Criminal Law* treatise and the Model Penal Code—"both * * * explain that a key requirement of burglary is the element of contemporaneous intent to commit a crime at the moment of the * * * unlawful 'remaining in' the structure." *Id.* at 665 (citing 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13(b), at 468 (1986), and Model Penal Code § 221.1 cmt. 1, 3 (1980)). Accordingly, the court concluded that "generic burglary requires intent to commit a crime *at the moment of* the unlawful entry or unlawful 'remaining in' a building or structure. That's what distinguishes burglary from simple trespass." *Id.* at 664-665.

The Seventh Circuit emphatically rejected "the government's view" that the "remaining-in variant of generic burglary" is "a continuous act." *Id.* at 665. "Rather, it is a discrete event that occurs at the moment when a perpetrator * * * exceeds his license and overstays his welcome." *Ibid.* (quoting *McArthur*, 850 F.3d at 939). The Seventh Circuit further explained that under the "continuous act" reading, "'entry' is almost superfluous: If 'remaining in' is a

continuous act, then every unlawful 'entry' would immediately become an unlawful 'remaining' as well," making the "entry" variant of the crime unnecessary. *Ibid.*[3]

Van Cannon is just the most recent case in a growing split that affects a large number of defendants. Whether defendants convicted under a statute that did not require contemporaneous intent will be eligible for an ACCA enhancement depends entirely on the happenstance of where they were sentenced. A defendant's eligibility for an ACCA enhancement should not depend on the fortuity of whether he is sentenced in one of the three circuits that require contemporaneous intent, instead of one of the four that do not. This Court should resolve the split and end the disparate application of ACCA to similarly situated defendants.[4]

3. This case provides a better vehicle than any of the other pending petitions, including *United States* v. *Herrold*, No. 17-1445, for resolving the question

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[3] *Van Cannon* will not, however, provide an alternate vehicle for this Court's review. The Government neither sought rehearing from the Seventh Circuit nor petitioned for a writ of certiorari in this Court.

[4] At oral argument in *Stitt*, the parties referred to a bill pending in Congress that would take a different approach to recidivist sentencing enhancements under 18 U.S.C. § 924(e). See, *e.g.*, S. 3335, 115th Cong., 2d Sess (2018). To date, it appears that apart from referral to relevant committees, neither chamber has taken any action on that bill. A different piece of proposed legislation, see H.R. 5682, 115th Cong., 2d Sess. (2018) ("First Step Act"), was passed by the House but, even if enacted in present form, would not address the question presented here.

presented. The government in *Herrold* asks this Court to resolve that question by granting its petition either alone or together with this case, see Pet. 10-11, *Herrold*, No. 17-1445. While it might be prudent to grant *Herrold* together with this case to allow this Court "to review the issue in the context of multiple state statutes," *id.* at 11, *Herrold* would not be a suitable vehicle on its own. First, the defendant in *Herrold* has filed a conditional cross-petition raising not only the *Stitt* issue (as the Texas statute in that case punishes burglary of vehicles), but also another independent ground. See *Herrold* v. *United States*, No. 17-9127. Second, the defendant in *Herrold* has argued that the Texas burglary statute contains additional features that make his case an inappropriate vehicle for resolving the contemporaneous-intent issue. See Br. in Opp. 12-14, *Herrold*, No. 17-1445. The government has identified no such complications in this case.

4. As the government explained, the three other petitions presenting this question are "less suitable vehicle[s]" than this case. U.S. Br. 12; see also U.S. Br. 10, *Moore* v. *United States*, No. 17-8153. *Ferguson* v. *United States*, No. 17-7496, poses several potential vehicle issues. First, Ferguson's case may be moot now that this Court has resolved *Stitt* in the government's favor. Ferguson has eight prior Tennessee convictions—five for aggravated burglary and three for burglary. Pet. 7, *Ferguson*, *supra*. After the "district court originally concluded" the Tennessee aggravated burglary statute qualified as generic burglary, the Sixth Circuit found that statute

overbroad based on the locational issue presented in *Stitt*, so the Sixth Circuit relied only on the three non-aggravated burglary convictions that are the subject of the *Ferguson* petition. Pet. App. 3, *Ferguson, supra*; see also Pet. 7, *Ferguson, supra*. However, given this Court's ruling in *Stitt*, Ferguson's five aggravated burglary convictions may themselves constitute generic burglary. If those aggravated burglary convictions support his ACCA sentence, it could moot the need to decide the status of his three non-aggravated burglary convictions. See Pet. 7, *Ferguson, supra*; see also Pet. App. 3. This case presents the *mens rea* issue without that complication.

Ferguson's petition also presents a further complication absent here. The district court examined Ferguson's burglary indictments, plea transcripts, and judgment orders to determine the burglary subsection to which Ferguson pleaded guilty. U.S. Br. 6, *Ferguson, supra*. It concluded that Ferguson "was convicted of a specific variant of Tennessee burglary * * * that qualifies as generic burglary under any circuit's interpretation of *Taylor*." *Id.* at 10. "Although the court of appeals resolved the case on an alternative ground," the government contends that the district court's determination means that Ferguson may not "benefit from a decision in his favor on the question presented." *Ibid.* Thus, as the government explained, "*Quarles* * * * present[s] a better vehicle for deciding the question presented." *Ibid.*

The two other petitions implicating the split, *Moore* v. *United States*, No. 17-8153, and *Secord* v. *United States*, No. 17-7224, also are poor vehicles for resolving

this question because they both arise from denials of certificates of appealability under 28 U.S.C. § 2255. U.S. Br. 2, *Moore, supra*; U.S. Br. 9, *Secord, supra*. Those cases do not squarely present the question whether the defendant's challenge to his sentence is meritorious; instead, they present the question whether the defendant is entitled to have his claim for collateral relief heard on appeal because the issue is reasonably debatable. See, *e.g.*, *Miller-El* v. *Cockrell*, 537 U.S. 322, 336-338, 348 (2003); *Slack* v. *McDaniel*, 529 U.S. 473, 483-484 (2000). Unlike Quarles' "direct appeal of the imposition of a criminal sentence," *Moore* and *Secord* would require this Court to consider whether reasonable jurists could find the district courts' decisions debatable by reviewing "unpublished order[s] denying [petitioners'] applications for [a certificate of appealability]." U.S. Br. 12, *Moore, supra*; see also U.S. Br. 9, *Secord, supra*. To avoid that procedural complication and resolve the central legal question presented here that has divided the circuits, this Court should "grant the petition in *Quarles* and hold the petition[s] in [*Secord*[5] and *Moore*] pending its disposition of *Quarles*." U.S. Br. 9, *Secord, supra*; *accord* U.S. Br. 12, *Moore, supra*.

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[5] *Secord* poses still other vehicle issues. First, Secord voluntarily withdrew his direct appeal of his initial sentence. U.S. Br. 4, *Secord, supra*. Second, his plea agreement contained an appeal waiver. *Id.* at 6 n.1. In addition to its finding that Secord's prior convictions constituted generic burglary, the district court also noted that waiver was an alternative reason to deny the § 2255 petition. *Ibid.*

CONCLUSION

The Court should grant Quarles' petition for a writ of certiorari.

Respectfully submitted.

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No. 17-778

In the Supreme Court of the United States

JAMAR ALONZO QUARLES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE FEDERAL PUBLIC DEFENDERS FOR THE NORTHERN, WESTERN, AND SOUTHERN DISTRICTS OF TEXAS SUPPORTING PETITIONER

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BRIEF OF AMICI CURIAE FEDERAL PUBLIC DEFENDERS FOR THE NORTHERN, WESTERN, AND SOUTHERN DISTRICTS OF TEXAS SUPPORTING PETITIONER

INTEREST OF AMICI CURIAE[1]

Amici are Jason D. Hawkins, the Federal Public Defender for the Northern District of Texas; Maureen Scott Franco, the Federal Public Defender for the Western District of Texas; and Marjorie A. Meyers, the Federal Public Defender for the Southern District of Texas. They represent indigent defendants in three of the nation's ten largest cities. Many of those defendants are currently subject

[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than Amici made a monetary contribution intended to fund the preparation or submission of this brief.

to mandatory sentences under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (ACCA). These clients include Michael Herrold, who is Respondent and Cross-Petitioner in two related cases pending before this Court (Nos. 17-1445 and 17-9127). See *United States* v. *Herrold*, 883 F.3d 517 (5th Cir. 2018) (en banc). And these clients stand to benefit if the Court holds for Petitioner under the argument he advances. This is because Texas's "burglary" statute, like Michigan's home-invasion statute and similar statutes in other states, allows for a conviction even where the trespasser lacks any intent to commit another crime *at the moment* he initially trespassed. If, as Petitioner maintains, such statutes lacking any contemporaneous-intent requirement do not fit within ACCA's generic burglary definition, then many of amici's clients burglary convictions (from Texas and elsewhere) cannot serve as ACCA predicates. Amici thus do not want to detract in any way from Petitioner's position.

Amici write instead to add further support to Petitioner by highlighting another feature of *Taylor*'s generic burglary definition that makes ACCA inapplicable in this case—*Taylor*'s definition requires the formation of specific intent to commit some other crime while trespassing. Yet the Michigan home-invasion statute, like those in Texas and a few other states, allows burglary convictions even when the defendant *never* forms specific intent to perform a post-entry crime. These statutes instead allow burglary convictions when the crime committed after the initial trespass involves only recklessness, negligence, or indeed, strict liability. This is an additional reason to deem these statutes too broad to fit within ACCA's generic burglary definition. Given the stakes for Petitioner, for amici's clients like Harrold, and for other defendants whose ACCA-predicate offenses involve burglary stat-

utes similar to Michigan's, amici urge the Court to consider this argument as a compelling reason to hold for Petitioner in this case, even if—indeed, especially if—the Court does not fully embrace Petitioner's own position.

INTRODUCTION AND SUMMARY OF ARGUMENT

From the beginning, "burglary" has been enumerated among the "violent felon[ies]" that count toward imposition of a 15-year mandatory minimum sentence under ACCA. Pub. L. No. 98-473, ch. 18, § 1802, 98 Stat. 1837, 2185 (1985). Nearly 30 years have elapsed since this Court first determined that the "generic definition of burglary" ACCA references is restricted to "an unlawful or unprivileged entry into, or remaining in, a building or other structure, *with intent* to commit a crime." *Taylor* v. *United States*, 495 U.S. 575, 598 (1990) (emphasis added).

The question in this case is whether *Taylor*'s "generic burglary" definition requires intent to be formed at a specific time—whether the invader must harbor the intention to commit some other crime *at the moment* he first trespassed, or whether it is enough that the trespasser later develops that intent *during* the trespass. Petitioner cited the circuit conflict over this question as grounds for this Court's review. And to this point, that is the question on which the Petitioner and the Government have joined issue.

Amici agree that Petitioner has the better end of that argument. Yet there is a related issue that ought to be considered in determining whether a state statute fits within the generic burglary definition. And this one tilts just as powerfully toward Petitioner: *Taylor*'s generic burglary definition requires specific intent to commit another crime while trespassing. Yet some burglary-like offenses, such as Michigan's home-invasion statute, allow a

conviction whenever a trespasser commits any crime—even if that crime is committed with a mental state less culpable than intent, like mere knowledge, recklessness, negligence, or even strict liability.

Four other states besides Michigan have expanded their definitions of burglary to include circumstances in which the putative burglar commits a crime requiring less than criminal intent. Those other states are Minnesota, *see* Minn. Stat. § 609.582 (eff. Aug. 1, 1988); Montana, see Mont. Code § 45-6-204(1)(b) & (2)(a)(ii) (eff. Oct. 1, 2009); Tennessee, see Tenn. Code § 39-14-402(a)(3) (eff. July 1, 1995); and Texas, see Tex. Penal Code § 30.02(a)(3) (eff. Jan. 1, 1974). The trouble with all these statutes is not merely a lack of contemporaneous intent. The trouble, as Judge Sykes put it in *Van Cannon* v. *United States*, is also that these statutes do not "require proof of intent to commit a crime *at all*—not at *any* point during the offense conduct." 890 F.3d 656, 664 (7th Cir. 2018) (emphasis added). That gave Judge Sykes reason to conclude that a conviction under Minnesota's nearly identical burglary statute, Minn. Stat. § 609.582 subd. 2, fell outside of ACCA's generic burglary definition for *two* reasons: not only did it not require proof of *contemporaneous* intent, it did not require proof of *any* intent. 890 F.3d at 664–665. Amici urge the Court to follow a similar path in analyzing ACCA's applicability to the trespass-plus-crime variant of Michigan's home-invasion statute. The Court can, and should, rule that the Michigan statute has the same problems as Minnesota's, which make it incapable of fitting within the generic burglary definition. And either, or both, of these fit problems prevent it from operating as an ACCA predicate offense.

This will hardly matter if the Court rules for Petitioner based on the argument he has advanced. If generic

burglary requires proof of specific intent to commit another crime *at the moment* an offender first trespasses, then obviously a crime like Michigan home invasion—which lacks any intent element at all—would not fit. But if the Court were inclined to reject that argument, or if the Court splits on it, amici's argument should still prove an attractive alternative. It fits squarely within the Question Presented. It fares just as well as Petitioner's argument in answering the Government's primary substantive argument. It follows directly from the generic burglary definition that ACCA adopted and *Taylor* retains. It is also narrow in scope, given the rarity of defining "burglary" in this unusual way. And the argument amici urge operates in a manner that yields simple rules that are easy to apply to other statutes in other cases. Accordingly, amici offer this argument as an alternative basis to rule for Petitioner—and a far superior alternative to a ruling for the Government in this case.

ARGUMENT

I. *Taylor*'s generic burglary definition requires that the defendant possess a *specific intent* to commit another crime beyond trespass.

1. "Since the time of Blackstone, the defendant's intent to commit a crime in the building" after an unlawful entry "has been the characteristic distinguishing burglary from mere trespass," both in England and in the United States. *State* v. *Chatelain*, 220 P.3d 41, 45 (Or. 2009) (en banc); 4 William Blackstone, *Commentaries on the Laws of England* 227 (1769) ("[I]t is clear, that [the] breaking and entry must be with a felonious intent, otherwise it is only a trespass."); accord 3 Joseph Chitty, *A Practical Treatise on the Criminal Law* 1095 (1816) ("No

breaking and entering * * * will be esteemed burglary unless the party *intended*, at the time, to commit a felony.") (emphasis added) (citations omitted).

This characteristic intent necessary for burglary requires an advance plan: a "particular intent to do a particular act." 2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 112 (3d ed. 1865). That mental state cannot be satisfied by anything less than true criminal intent. One who is *planning* is not acting recklessly or negligently. Nor can one plan to mistakenly but understandably run afoul of a strict-liability law. Planning requires intent.

2. Congress defined burglary to require this sort of intentional planning when it enacted ACCA in 1984. Pub. L. No. 98-473, ch. 18, § 1083(a), 98 Stat. 1837, 2185 (1984). The statute defined burglary as "any felony consisting of entering or remaining surreptitiously within a building that is property of another with *intent* to engage in conduct constituting a Federal or State offense." *Ibid.* (emphasis added).

3. When that definition of burglary was deleted in 1986, an "inadvertent casualty of a complex drafting process," *Taylor*, 495 U.S. at 589-590, the Court drew upon nationwide surveys of state burglary laws to craft a substitute. To determine what the "generic, contemporary meaning of burglary" ought to include, 495 U.S. at 598, the Court noted that "[b]urglary was defined by the common law to be the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony," *id.* at 580 n.3 (citation omitted). While the Court recognized some of those common-law elements had not been retained in some modern-day state-law variants, the Court made clear that specific intent remained integral to the generic offense. As Petitioner has noted,

Taylor drew principally from two authorities: "the 1986 edition of LaFave and Scott's" treatise *Substantive Criminal Law*, "and the American Law Institute's Model Penal Code." Pet. Br. 23 (citing 495 U.S. at 598 & n.8). Both unequivocally took the position that intent remained a requirement for burglary. See *United States* v. *McArthur*, 836 F.3d 931, 939 (8th Cir. 2016). (citing LaFave & Scott and the Model Penal Code).

The Model Penal Code's definition of burglary requires proof that the defendant "enter[ed] a building or occupied structure * * * with *purpose* to commit a crime therein." Model Penal Code § 221.1(1)(1980) (emphasis added). Similarly, LaFave and Scott explained that the "prevailing view in the modern codes" is that an intent to commit an offense was required, even if the nature of the offense itself was unimportant—"any offense will do." 2 LaFave & Scott § 8.13(e), at 473–74 (1986).

This idea that burglary necessarily involves intent and purpose to commit an additional crime while trespassing, not mere recklessness, negligence or less, reflected practice among the states at the time of ACCA's 1984 enactment and 1986 revision. During that period, the burglary analogs of virtually every state required prosecutors to prove that the offender *intended* to commit some crime (other than trespass) inside the premises. By that time, most states had expanded burglary to reach not only someone who *entered* without authorization, but also someone who made a "lawful entry" but then "surreptitiously" remained after his license expired. Under either of these widely-adopted theories, unlawful *entry* or unlawful *remaining*, prosecutors had to prove "the requisite intent to commit a crime within" the premises. 2 LaFave & Scott, § 8.13(b), at 468 (1986).

LaFave & Scott identified only "one jurisdiction" that had dispensed with the intent element: Texas. *Id.* § 813(e), at 475. In addition to the two standard theories of burglary liability, Texas created a *third* alternative: unlawful entry, followed by commission of any "felony, theft, or an assault." Tex. Penal Code § 30.02(a)(3). Compare Tex. Penal Code § 30.02(a)(1) (entry-with-intent) & (a)(2) (surreptitiously remaining with intent), with Tex. Penal Code § 30.02(a)(3) (eff. Jan. 1, 1974) (enacted Tex. Acts 1973, 63rd leg., ch. 399 § 1). And in Texas today, there are numerous felonies and assaults that can be committed recklessly, negligently, or without specific intent. See, e.g., Tex. Penal Code § 22.04(a) (making it a felony if the defendant "intentionally, knowingly, recklessly, intentionally, knowingly, recklessly, or with criminal negligence" causes serious injury to a child); *id.* § 22.01 (making recklessly causing bodily injury a felony); *id.* § 22.011(a)(2) (making statutory rape a "strict liability offense," *May* v. *State*, 919 S.W.2d 422, 424 (Tex. Ct. Crim. App. 1996) (en banc)).

Texas was thus the first, and when ACCA was enacted, the only state to extend its crime of burglary to include situations where a trespasser committed a reckless or negligent crime inside the building. This was an entirely new variant of burglary, more akin to an aggravated form of criminal trespass.[2] Judge Sykes called this new sort of criminal-trespass-as-burglary variant "trespass-plus-crime." See *Van Cannon*, 890 F.3d at 664 (discussing Minnesota burglary).

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[2] When Maine enacted a similar trespass-plus-crime offense in 1999, it recognized that this was an "aggravated" *trespassing* offense, not a *burglary* offense. See Me. Rev. Stat. tit. 17-A, § 402-A.

When *Taylor* identified the elements of a generic burglary crime, it excluded unusual outliers like burglary-by-shoplifting and vending-machine burglary. 495 U.S. at 599. It is therefore no surprise that the generic definition left no room for this just emerging trespass-plus-crime theory.[3] Instead, *Taylor*'s generic burglary definition adhered to its common-law forebears and state-law contemporaries, demanding that "burglary" involve "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with *intent* to commit a crime." *Id.* at 598 (emphasis added). It requires intent. And that makes ACCA's definition of generic burglary too narrow to accommodate statutes requiring anything less.

II. State trespass-plus-crime laws, like Michigan's, lack the mental culpability *Taylor* requires for generic burglary.

In the years since *Taylor*, a few states have followed Texas's lead and expanded their burglary statutes to include one or more trespass-plus-crime alternatives. These variants do not require proof of specific intent.

1. As Petitioner notes (Br. at 8-9), Michigan's home-invasion crime is among them. Michigan enacted that statute more than a decade after ACCA. Mich. Comp. L. § 750.110a(2), (3), (4)(a) (eff. Oct. 1, 1999). "A person is guilty" of the third-degree Michigan offense if he "enters a dwelling without permission and, at any time while he

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[3] *Taylor* easily concluded that burglary of a vending machine was broader than the generic form of the offense, even though "[a] few States' burglary statutes" had expanded their definitions that far. 495 U.S. at 599. At the time, at least three states defined "burglary" to include offenses against vending machines." See Tex. Penal Code § 30.03 (eff. 1974); Colo. Rev. Stat. § 18-4-204(1) (eff. 1981); Okla. Stat. tit. 21, § 1435(A) (eff. 1961). Texas's new trespass-plus-crime theory of burglary was even rarer than its vending-machine cousin.

or she is entering, present in, or exiting the dwelling, commits a misdemeanor." Mich. Comp. L. § 750.110a(4)(a).

The Michigan Penal Code, like Texas's contains numerous misdemeanors likely to be committed by a *negligent* or *reckless* trespasser. For example, losing a dog while traveling is a misdemeanor, Mich. Comp. L. § 750.50(2)(e), unless the owner makes a "reasonable effort to locate the animal." So a traveler with a dog who breaks into a vacant cabin during a Michigan winter, only to have the dog run away in pursuit of some prey, has committed third-degree home invasion. If the trespasser is a father accompanied by his own child, and the father's omission or reckless act causes the child injury, Mich. Comp. L. § 750.136b(7)(a), the father is a third-degree home invader. A hunter who breaks into the same abandoned cabin to escape an unexpected winter storm, and then discharges his rifle "because of carelessness, recklessness or negligence, but not willfully or wantonly," Mich. Comp. L. § 752.862, is guilty of home invasion if the inadvertent shot removes plaster from the walls.

As Petitioner points out, a consensual tryst between two young people can also lead to a charge of misdemeanor "sexual conduct," even if the older teen reasonably believes the younger is old enough to legally consent. Pet. Br. 9 (citing *People* v. *Cash*, 351 N.W.2d 822, 824–828 (Mich. 1984)). If the amorous couple (or one of its members) slips into a dwelling uninvited, then the elder is guilty of home invasion. And that is true even if the defendant never *intended* to commit any crime at all other than the trespass.

2. Besides Texas and Michigan, three other states expanded their definition of "burglary" to include commission of a crime requiring less than criminal intent while trespassing. All three made this change after ACCA was

enacted. Minnesota, for example, in 1988 enacted a statute, Minn. Stat. § 609.582, under which a person can be convicted of burglary if he enters a building without consent and commits a crime while in the building. As Judge Sykes recognized in *Van Cannon*, there are numerous ways under this statute for an entry to be "unprivileged but not accompanied by burglarious intent." 890 F.3d at 664. For example, a trespasser might "recklessly handle[] * * * a dangerous weapon" in a way that "endanger[s] the safety of" his companion. Minn. Stat. § 609.66, subd. 1(a)(1). He could also "recklessly cause[] a child under 14 years of age to be placed in a situation likely to substantially harm the child's physical health," Minn. Stat. § 609.378, subd. 1(c); or negligently store "a loaded firearm in a location where the person * * * reasonably should know[] that a child is likely to gain access," Minn. Stat. § 609.666, subd. 2. If he "broke into a building without permission to escape the cold," *Van Cannon*, 890 F.3d at 664, lit a fire to stay warm, but then was "grossly negligent" in allowing that fire to burn out of control, he would be guilty under Minn. Stat. § 609.576, subd. 1(3), even though he never *intended* to cause fire damage. The same is true if he brings his dog into the building, then negligently allows it to run free, resulting in injury to another person. Minn. Stat. § 609.226 subd. 1.

Under each of these circumstances, the trespasser is a *burglar* in Minnesota. But he has not committed a generic burglary, because he *never* formed the intent to commit any crime other than trespassing. As the Seventh Circuit held, "the trespass-plus crime alternative in the Minnesota statute doesn't require proof of intent to commit a crime *at all*—not at *any* point during the offense conduct." *Van Cannon*, 890 F.3d at 664. And that separates it from generic burglary.

3. In 1995, Tennessee adopted a burglary statute that is nearly identical to Texas's, including the trespass-plus-crime alternative. A defendant commits Tennessee burglary if he "[e]nters a building and commits or attempts to commit a felony, theft or assault." See Tenn. Code § 39-14-402(a)(3) (eff. July 1, 1995). While felonies often involve a more culpable mental state than misdemeanors, not all require specific intent. See, e.g., Tenn. Code § 39-13-103(b)(2), (3) (reckless endangerment with deadly weapon or firearm); *id.* § 39-13-102(a)(1)(B), 102(e)(1)(A)(v) (aggravated assault by reckless causation of serious bodily injury).

4. In 2009, Montana also enacted a burglary statute that does not require the intentional plan needed for generic burglary. Montana's statute, however, is a shorter distance from the generic version than the others. This is because Montana requires proof that the defendant *knowingly or purposefully* committed the other offense while trespassing. Mont. Code § 45-6-204(1)(b) & (2)(a)(ii) (eff. Oct. 1, 2009). Yet that still puts it among the total of five states, including Michigan, that define burglary to include the commission of knowing, negligent, reckless, or even strict liability crimes while trespassing. None of these so-called burglaries has a specific intent element. Each of them is broader than generic burglary for that reason alone, regardless of whether *Taylor*'s "intent" element must be contemporaneous with the initial trespass.

5. This conclusion is only reinforced by ACCA's overarching purposes: to reach the "career offenders" who make their livelihood from crime, *Taylor*, 495 U.S. at 583, or who are dangerous enough to "use [a] gun deliberately to harm a victim," *Begay* v. *United States*, 553 U.S. 137, 145 (2008). Petitioner is correct that a homeless defendant who commits a "low-risk, spur of the moment" crime

while trespassing to "seek shelter from the cold" is a long way from the sort of hardened career criminal ACCA meant to reach. Pet. Br. 3. That distance is all the greater to the person who trespassed having no intent to commit any crime *at all*. There is simply no indication that the unsuspecting boyfriends who sneak in through their underage girlfriends' windows and hapless travelers who lose their dogs ought to have these crimes of circumstance counted toward a 15-year minimum federal sentence. These are simply not the sort of unrepentant careerists that ACCA means to reach.

III. This argument meets the Government's principle substantive objection in this case.

In addition to its historical pedigree and intuitive appeal, amici's argument also fares just as well as Petitioner's own argument at answering the Government's central argument in this case. The Government attempts to paper over Petitioner's objections about timing by labeling them unimportant. In the Government's view, all that ought to matter is that the intent required for burglary exist *at some point*, and it contends "anyone violating" Michigan's home invasion statute "necessarily had to form the requisite intent to commit a misdemeanor either before he entered the dwelling or while he was still inside." U.S. Opp. 8–9 (quoting *Taylor*, 495 U.S. at 499). Petitioner has advanced several good reasons why timing *is* important. But even under the Government's argument, "intent" must still *exist* during the trespass. And Michigan's misdemeanors do not necessarily require "intent," meaning the "requisite intent" for generic burglary is completely absent in Michigan's trespass-plus-crime alternative—and several other states' variants as well. The Government thus has not, and cannot, provide any reason how these trespass-plus-crime statutes can fit within the

definition of generic burglary. That is fatal to the Government's position.

IV. This argument is an appropriate addition to the one Petitioner presents.

There are still more reasons why amici's argument is an appropriate and attractive addition to Petitioner's.

1. For one thing, amici's argument is squarely within the Question Presented, which requires determining "[w]hether *Taylor*'s definition of generic burglary requires proof that intent to commit a crime was present at the time of unlawful entry or first unlawful remaining." (Pet. Br. I) The Court can rule for Petitioner based on both the timing of *when* the "intent to commit a crime" must be formed, and on the absence of any specific "intent to commit a crime" (other than trespass), which is a required element under *Taylor*'s definition of generic burglary. Accordingly, amici's argument is properly before the Court and could provide an appropriate rule of decision in this case.

2. The position amici advance is also narrow in scope. Amici's argument would only apply where state law contains no "intent" element at all. The trespass-plus-crime statutes amici highlight all have the same dual-fit problems as Michigan's home-invasion statute—a mismatch with *Taylor*'s generic burglary definition on two sides: absence of a *contemporaneous* intent element and absence of any intent element *at all*. The rule thus involves the same general universe of burglary variants as Petitioner's argument, but impacts only Michigan and the four other states highlighted above.

The circuit-level cases discussing the contemporaneous intent issue virtually all involve trespass-plus-crime statutes, and thus involve both of the fit problems amici

highlight. That, of course, includes the decision below involving the Michigan home invasion statute. But it also includes two cases involving Minnesota Statutes § 609.582: *Van Cannon*, 890 F.3d at 660, 663-664 and *McArthur*, 836 F.3d 931). It also includes three cases that have involved Tex. Penal Code § 30.02(a)(3): *United States* v. *Bonilla*, 687 F.3d 188, 197 (4th Cir. 2012); *United States* v. *Constante*, 544 F.3d 584, 584 (5th Cir. 2008) (per curiam), and more recently *United States* v. *Herrold*, 883 F.3d 517, 530-531 (5th Cir. 2018) (en banc).

Except for *Van Cannon*, none of the cases examined *both* of these fit problems—each was resolved on the contemporaneous-intent problem alone. *Compare Van Cannon*, 890 F.3d at 664–665 ("[G]eneric burglary requires intent to commit a crime *at the moment of* the unlawful entry or unlawful 'remaining in' a building or structure.") (emphasis in original); *McArthur*, 850 F.3d at 939 ("[A] generic burglary requires intent to commit a crime at the time of the unlawful or unprivileged entry or the initial 'remaining in' without consent."); *Herrold*, 883 F.3d at 536 ("Texas's burglary offense allowing for entry and subsequent intent formation * * * is broader than generic burglary."); *with* Pet. App. 7a–8a; *Bonilla*, 687 F.3d 188 at 193 ("Because [Texas Penal Code] section (a)(3) requires an unlawful entry, of a building or habitation, and the separate intent to commit a felony, theft, or assault, we find that it corresponds 'in substance' to *Taylor*'s generic definition of burglary."). But as *Van Cannon* itself demonstrates, these trespass-plus-crime variants have *two* differences with generic burglary: they not only lack a *contemporaneous* intent element, they lack any intent element *at all*.

3. Both of these fit problems doom the use of Michigan's home-invasion statute as an ACCA predicate. The

decision in this case should highlight both of those fit problems, providing the same guidance for the nation that *Van Cannon* provided for the Seventh Circuit. 890 F.3d at 664–665. At the very least, amici's argument could prove an attractive alternative to ruling for the Government.

4. If the Court were to agree with the Government that generic burglary includes crimes where a trespasser initially lacks any intent to commit another crime but later forms that intent, then, at a minimum, amici urge the Court to remand the case to the Sixth Circuit for consideration of *non-intentional* crimes committed by a trespasser.

That was the course the Court took in *United States v. Stitt*, 139 S. Ct. 399 (2018). The primary question the Court considered was whether burglary of a vehicle "designed or adapted for overnight use" is a generic burglary. *Id.* at 407. The Court answered that question in the affirmative. One of the respondents raised an additional argument: that Arkansas permitted conviction for burglary of a non-adapted vehicle "in which any person lives." *Stitt*, 139 S. Ct. at 407–408. This Court remanded that case to the Eighth Circuit for further consideration of that aspect of Arkansas law. *Id.* It would be equally appropriate for the Court to follow that course here.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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APPENDIX A

Texas Penal Code § 30.02. Burglary

(a) A person commits an offense if, without the effective consent of the owner, the person:

(1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or

(2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or

(3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

* * *

APPENDIX B

Minnesota Statutes § 609.582. Burglary

Subdivision 1. Burglary in the first degree. Whoever enters a building without consent and with intent to commit a crime, or enters a building without consent and commits a crime while in the building, either directly or as an accomplice, commits burglary in the first degree and may be sentenced to imprisonment for not more than 20 years or to payment of a fine of not more than $35,000, or both, if:

(a) the building is a dwelling and another person, not an accomplice, is present in it when the burglar enters or at any time while the burglar is in the building;

(b) the burglar possesses, when entering or at any time while in the building, any of the following: a dangerous weapon, any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon, or an explosive; or

(c) the burglar assaults a person within the building or on the building's appurtenant property.

Subd. 1a. Mandatory minimum sentence for burglary of occupied dwelling. A person convicted of committing burglary of an occupied dwelling, as defined in subdivision 1, clause (a), must be committed to the commissioner of

corrections or county workhouse for not less than six months.

Subd. 2. Burglary in the second degree. (a) Whoever enters a building without consent and with intent to commit a crime, or enters a building without consent and commits a crime while in the building, either directly or as an accomplice, commits burglary in the second degree and may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than $20,000, or both, if:

(1) the building is a dwelling;

(2) the portion of the building entered contains a banking business or other business of receiving securities or other valuable papers for deposit or safekeeping and the entry is with force or threat of force;

(3) the portion of the building entered contains a pharmacy or other lawful business or practice in which controlled substances are routinely held or stored, and the entry is forcible; or

(4) when entering or while in the building, the burglar possesses a tool to gain access to money or property.

(b) Whoever enters a government building, religious establishment, historic property, or school building without consent and with intent to commit a crime under section 609.52 or 609.595, or enters a government building, religious establishment, historic property, or school building without consent and commits a crime under

section 609.52 or 609.595 while in the building, either directly or as an accomplice, commits burglary in the second degree and may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than $20,000, or both.

Subd. 3. Burglary in the third degree. Whoever enters a building without consent and with intent to steal or commit any felony or gross misdemeanor while in the building, or enters a building without consent and steals or commits a felony or gross misdemeanor while in the building, either directly or as an accomplice, commits burglary in the third degree and may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

Subd. 4. Burglary in the fourth degree. Whoever enters a building without consent and with intent to commit a misdemeanor other than to steal, or enters a building without consent and commits a misdemeanor other than to steal while in the building, either directly or as an accomplice, commits burglary in the fourth degree and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $3,000, or both.

APPENDIX C

Tennessee Code § 39-14-402. Burglary

(a) A person commits burglary who, without the effective consent of the property owner:

(1) Enters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault;

(2) Remains concealed, with the intent to commit a felony, theft or assault, in a building;

(3) Enters a building and commits or attempts to commit a felony, theft or assault; or

(4) Enters any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony, theft or assault or commits or attempts to commit a felony, theft or assault.

* * *

APPENDIX D

Michigan Compiled Laws § 750.110a. Definitions; breaking and entering a dwelling; crime of home invasion

* * *

(2) A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:

(a) The person is armed with a dangerous weapon.

(b) Another person is lawfully present in the dwelling.

(3) A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the second degree.

(4) A person is guilty of home invasion in the third degree if the person does either of the following:

(a) Breaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor.

(b) Breaks and enters a dwelling or enters a dwelling without permission and, at any time while the person is entering, present in, or exiting the dwelling, violates any of the following ordered to protect a named person or persons:

(i) A probation term or condition.

(ii) A parole term or condition.

(iii) A personal protection order term or condition.

(iv) A bond or bail condition or any condition of pretrial release.

APPENDIX E

Montana Code § 45-6-204. Burglary

(1) A person commits the offense of burglary if the person knowingly enters or remains unlawfully in an occupied structure and:

(a) the person has the purpose to commit an offense in the occupied structure; or

(b) the person knowingly or purposely commits any other offense within that structure.

(2) A person commits the offense of aggravated burglary if the person knowingly enters or remains unlawfully in an occupied structure and:

(a)(i) the person has the purpose to commit an offense in the occupied structure; or

(ii) the person knowingly or purposely commits any other offense within that structure; and

(b) in effecting entry or in the course of committing the offense or in immediate flight after effecting entry or committing the offense:

(i) the person or another participant in the offense is armed with explosives or a weapon; or

(ii) the person purposely, knowingly, or negligently inflicts or attempts to inflict bodily injury upon anyone. * * *

No. 17-778

IN THE

Supreme Court of the United States

JAMAR ALONZO QUARLES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

INTRODUCTION AND SUMMARY OF ARGUMENT

At common law, burglary required an unlawful entry with intent to commit a crime. *See, e.g.*, 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13, at 464 (1986). That common law definition has been expanded in the context

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

of the Armed Career Criminal Act to include not only unlawful entry, but also unlawful "remaining." The critical question presented in this case is what effect the "remaining" language has on the definition of burglary. Does it "broaden the definition of criminal trespass," or does it "eliminate the requirement that the act constituting criminal trespass be accompanied by contemporaneous intent to commit a crime"? *People v. Gaines*, 546 N.E.2d 913, 915 (N.Y. 1989).

The statutory text and its evolution show that the "remaining" language was not intended to eviscerate the contemporaneous intent requirement. In the 1970s and 1980s, commentators recommended an important limitation on any expansion of burglary statutes to reach unlawful remaining after a lawful entry: that the remaining be done *surreptitiously*. Congress heeded this advice in the Armed Career Criminal Act of 1984. A *surreptitious* remaining embodies a contemporaneous intent requirement and belies the notion that Congress intended to dispose with that essential element of burglary in the Armed Career Criminal Act of 1986.

Even if the statutory text and legislative history were less than clear, the separation of powers principles underlying the rule of lenity militate against an expansive construction of an ambiguous criminal statute. That concern is particularly salient here given the deep roots of the contemporaneous intent requirement and the harsh consequences its abolition would impose for relatively minor conduct. Congress is required to speak much more explicitly before it can be viewed as making such a dramatic and consequential change to the criminal law.

ARGUMENT

I. Congress's Definition Of Burglary As Surreptitiously Remaining Embodies A Contemporaneous Intent Requirement.

In the 1970s and 1980s, commentators discussing proposals to expand burglary beyond unlawful entry recommended limiting that expansion to unlawful *surreptitious* remaining. Congress followed this recommendation in its criminal legislation in the 1980s. In the context the term was used by commentators and Congress, a surreptitious remaining embodies a contemporaneous intent requirement.

A. Pre-ACCA commentators recommended that burglary expand to only *surreptitious* remaining.

From the early 1970s through the 1980s, prominent bodies reviewing criminal law issues recommended legislative changes to the common law of burglary.

One of the first to do so was the National Commission on Reform of Federal Criminal law, established by Congress in 1966 to "make a full and complete review and study ... for the purpose of formulating and recommending to the Congress legislation which would improve the federal system of criminal justice." Pub. L. No. 89-801, § 3, 80 Stat. 1516, 1516 (1966). The Commission, which came to be known as the Brown Commission after its chairman, Hon. Edmund G. Brown, was comprised of

three senators, three members of the House of Representatives, three federal judges, and three other members appointed by the President. *Id.* § 2(a), 80 Stat. 1516; *see also* American Law Institute, Model Penal Code § 221.1, cmt. 3 at 71 (1980). After years of research, the Brown Commission released a two-volume set of working papers (totaling almost 1500 pages) and a lengthy final report (of more than 350 pages). *See* National Commission on Reform of Federal Criminal Laws, Working Papers (1970); National Commission on Reform of Federal Criminal Laws, Final Report (1971).

Part of this undertaking involved a detailed analysis of the crime of burglary. At the time, there was no generic federal burglary statute. Final Report § 1711, at 200. The Commission proposed one and discussed its scope, observing:

> [S]ome modern Codes limit burglary proscriptions only to intrusions accomplished by unlawful entry. That is, a person who properly enters into property but remains there past the time when he properly can be there, even with intent to commit a crime, is not considered to be a burglar.... Other modern Codes, however, include, as burglary, remaining on premises without privilege to do so and with intent to commit a crime (e.g. the New York Revised Penal Law § 140.00 (McKinney 1967), and the Illinois Criminal Code § 19-1 (1961)).

II Working Papers, *supra*, at 895.

The Commission noted that this "remaining" language would, for example, "be helpful in prosecuting burglaries of Federal office buildings where access is open during normal business hours but restricted to authorized personnel at other times." *Id.* But the Commission also had concerns that this language "may overly broaden the scope of the burglary statute":

> A visitor to one's home, for example, who becomes involved in an argument with his host, threatens to punch him in the nose, and is asked to leave, would no longer be privileged to remain on the premises; if he does not leave, but continues his threatening argument, he would, if simply 'remaining' without privilege is included in the proposed definition, be guilty of burglary.

Id. To avoid this result, the Commission recommended that the burglary provision it was proposing be "limited to acts of 'surreptitiously' remaining on premises." *Id.*

The Model Penal Code, revised in 1980 and drawing heavily on the Brown Commission's study, addressed this same development in burglary statutes: "language designed to deal with one who remains unlawfully on premises." *See* Model Penal Code § 221.1, cmt. 3 at 70. Like the Brown Commission, the Model Penal Code emphasized that there

were two potential benefits to such an expansion of the common law formulation. First, "lawful entry does not necessarily foreclose the kind of intrusion that burglary is designed to reach." *Id.* The Model Penal Code gave two examples—"a customer who hides in a bank until after closing hours and then undertakes his criminal activity" and "a guest invited to a home who hides in a closet and engages in criminal activity when the homeowner believes that all his guests have gone"—that would fall outside the scope a burglary statute limited to unprivileged entry. *Id.* Second, the Model Penal Code noted a practical problem of proof: In the absence of "evidence of forcible breaking," would-be burglars could argue that they "entered before closing time" and hence avoid criminal liability. *Id.*

In addition to these benefits, however, the Model Penal Code noted "a difficulty" with the "remaining" language "that should lead to its rejection." *Id.* at 71. Quoting from the Working Papers from the Brown Commission, the Model Penal Code noted that this language would encompass conduct that no one would consider to be burglary: a guest refusing to leave when asked and punching his host in the nose. *Id.* For all of these reasons, the Model Penal Code recommended that if burglary were to be expanded beyond unlawful entries, such expansion reach only unlawful *surreptitious* remaining.[2] *Id.*

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[2] The Model Penal Code did not itself include the "remaining" language in its definition of burglary, which was limited to entry with criminal intent, described as the "core" of common law burglary. Model Penal Code § 221.1 & cmt. 3 at 69.

B. Congress incorporated this recommendation in its 1980s legislation.

Congress's criminal legislation in the early 1980s followed the approach recommended by the Brown Commission and the Model Penal Code.

In connection with the proposed Criminal Code Reform Act of 1981, Congress recommended creating a federal burglary offense. S.1630, 97th Cong. § 1712 (1981); *see also* S. Rep. No. 97-307, at 649 (1981). In defining burglary and its lesser included offense of criminal trespass, Congress included one who "without privilege ... enters or remains *surreptitiously* within a dwelling that is the property of another." S.1630 §§ 1711, 1712 (emphasis added); *see also* S. Rep. No. 97-307, at 650, 655. In an accompanying committee report, Congress alluded to the Brown Commission and Model Penal Code's concern, albeit without citation, noting that "[t]he qualifying term 'surreptitiously' is used in order to prevent the statute from applying to the type of situation where an individual invited to one's home is subsequently asked to leave, but refuses and threatens to punch his host in the nose." S. Rep. No. 97-307, at 651 (footnotes omitted).

While the Criminal Code Reform Act of 1981 did not become law, Congress borrowed from it in enacting the Armed Career Criminal Act of 1984. A Senate committee report from an early version of the law explained that the statute's definition of burglary was "essentially the offense entitled 'criminal entry' from Section 1712 of the Criminal Code Reform Act." S. Rep. No. 98-190, at 20 (1983). The resulting

definition of burglary was "any felony consisting of entering or remaining *surreptitiously* within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." Pub. L. No. 98-473, ch. 18, 98 Stat. 1837, 2185, 18 U.S.C. App. § 1202(c)(9) (1982 ed., Supp. III) (emphasis added).

Congress did not include a definition of burglary in the Armed Career Criminal Act of 1986 (ACCA).[3] As this Court observed in *Taylor v. United States*, this "may have been an inadvertent casualty of a complex drafting process" and did not suggest "that Congress intended in 1986 to replace the 1984 ... definition of burglary with something entirely different." 495 U.S. 575, 589-90, (1990). For that reason, the Court in *Taylor* emphasized, the generic definition of burglary "is practically identical to the 1984 definition," in part because "there simply [wa]s no plausible alternative that Congress could have had in mind." *Id.* at 598. Indeed, a leading treatise published the same year Congress enacted ACCA again recommended "limit[ing] the remaining-within alternative to where that conduct is done surreptitiously." 2 LaFave & Scott, *supra*, § 8.13, at 468.

Generic burglary as Congress used the term in 1986, then, is properly seen as requiring not just any unlawful remaining, but an unlawful *surreptitious* remaining.

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[3] To avoid confusion, this brief will use the acronym ACCA to refer only to the Armed Career Criminal Act of 1986 and will refer to the Armed Career Criminal Act of 1984 using its complete title.

C. A surreptitious remaining necessarily embodies a contemporaneous intent requirement.

To act surreptitiously is to act clandestinely, secretly, or by stealth. *E.g.*, Oxford English Dictionary (2d ed. 1989), https://tinyurl.com/oed-surreptitious. Both the Model Penal Code and LaFave & Scott described surreptitious remaining with examples of *hiding*—in a bank or a closet in particular. Model Penal Code § 221, cmt. 3 at 71; 2 LaFave & Scott, *supra*, § 8.13(b), at 468. The person surreptitiously remaining must have had the intent to commit a future crime at the moment he first hid; there would be no reason to hide otherwise. By its very nature, then, "surreptitious remaining" refers to lying in wait after a lawful entry to commit some later crime and consequently incorporates a contemporaneous intent requirement.[4]

That fact is further evidenced by the way courts reading the contemporaneous intent requirement out of generic burglary have also eviscerated the requirement that a remaining be surreptitious. A common refrain by opponents of the contemporaneous intent requirement is that "someone who enters a building or structure and, while inside, commits or attempts to commit a felony will necessarily have remained inside the building or structure to do so."

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[4] The concept of surreptitious remaining is a *limitation* on the contemporaneous intent principle. Thus, there can be contemporaneous intent to commit a crime without surreptitious remaining, and such conduct—like punching a host in the nose after being asked to leave—is not burglary.

United States v. Priddy, 808 F.3d 676, 685 (6th Cir. 2015). But such a person will not necessarily have remained *surreptitiously* on the premises to do so. The classic example is one that the Model Penal Code, LaFave & Scott, and Congress have all described as outside the bounds of burglary: A guest who begins threatening his host, refuses to leave when asked, and then punches his host in the nose. Other illustrations of the same ilk include a homeless person who breaks into an office during a snowstorm and stays near the heating vents to keep warm but who later steals something, *Gaines*, 546 N.E.2d at 914, and "teenagers who unlawfully enter a house ... to party, and only later decide to commit a crime," *United States v. Herrera-Montes*, 490 F.3d 390, 392 (5th Cir. 2007). These scenarios do not involve remaining *surreptitiously* on the premises but instead open trespass.

These examples illustrate that elimination of the contemporaneous intent requirement sweeps in conduct that Congress deliberately sought to exclude from the bounds of burglary. Take, for example, *State v. Herron*, 70 So. 3d 705 (Fla. Dist. Ct. App. 2011). A man climbed up the balcony of the home of his ex-girlfriend, who let him in. *Id.* at 706-07. He "told her he needed a place to sleep because his parents had kicked him out." *Id.* at 707. She asked him to leave, but he refused. *Id.* Suspecting that she had a new boyfriend, he went to the bedroom, opened the closet, and found a man hiding inside. *Id.* The two men fought, and the ex-girlfriend was injured while trying to break up the fight. *Id.* Although the Florida court conceded that the man lacked intent to commit a crime at the time when he entered or first re-

mained, the Florida court found this to be a burglary on the theory that intent to commit a crime can be formulated at any time during a trespass. *Id.*; *see also State v. Gutierrez*, 172 P.3d 18, 23 (Kan. 2007) ("Once she told him to leave ... his presence was unauthorized even if previously permitted. Evidence of development of defendant's intent to commit a felony at any point [thereafter] was legally sufficient to support the aggravated burglary conviction."). While the surreptitious remaining requirement was meant to exclude precisely this kind of scenario, which is strikingly similar to the hypothetical guest punching his host in the nose, the Sixth Circuit's decision would sweep it back in.

In sum, a contemporaneous intent requirement is inherent in the requirement that a remaining be surreptitious. By adding a surreptitious remaining alternative to unlawful entry, then, "the Legislature sought to broaden the definition of criminal trespass, not to eliminate the requirement that the act constituting criminal trespass be accompanied by contemporaneous intent to commit a crime." *Gaines*, 546 N.E.2d at 915. Under this view, an unlawful remaining is not a continuous period of trespass during which intent to commit a crime may be formed at any point. Instead, the phrase refers to the point in time at which point a burglar who entered premises lawfully hides himself with the intent to commit some future crime.

II. Eliminating Burglary's Contemporaneous Intent Requirement Would Violate The Principles Of Due Process And Separation Of Powers Underlying The Rule Of Lenity.

"Even if the language and history of [ACCA] were less clear" than set forth above, *see also* Pet. Br. 15-28, it "could not properly be expanded as the Government suggests ... [because] this being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity." *United States v. Enmons*, 410 U.S. 396, 411 (1973).

A. Absent a clear expression of Congressional intent, the choice between interpretations of a criminal statute is governed by the rule of lenity.

The "remaining" language can be viewed in one of two ways. On the first view, "remaining" is an alternative to unlawful entry and, like entry, refers to the particular moment in time when the would-be burglar becomes a trespasser. Viewed through this lens, it "broaden[s] the definition of criminal trespass" but does "not ... eliminate the requirement that the act constituting criminal trespass be accompanied by contemporaneous intent to commit a crime." *Gaines*, 546 N.E.2d at 915; *see also State v. Mahoe*, 972 P.2d 287, 291 (Haw. 1998) ("It would be an unwarranted extension of Hawai'i's modern burglary statute to expand the offense of burglary to include situations in which the criminal intent develops after an unlawful entry or remaining has occurred."). On the second view, "remaining" is a continuous period that lasts for the duration of a

trespass. Viewed through that lens, any crime committed while someone is trespassing is a burglary because such a person "will necessarily have remained inside the building or structure to do so." *Priddy*, 808 F.3d at 685; *see also State v. Dible*, 538 N.W.2d 267, 271 (Iowa 1995) (because "the statute contemplates the decision [to remain] as a continuous event, beginning when a defendant determines to unlawfully remain on the premises and ending when the defendant leaves the premises," "[i]f, at any point on this continuum, a defendant forms the intent to remain on the premises with the intent to commit an assault or theft, at that point, the defendant commits burglary").

Under the rule of lenity, "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before [courts] choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347-48 (1971) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952)).

This rule has two constitutional underpinnings. First, it "vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed." *United States v. Santos*, 553 U.S. 507, 514 (2008) (Scalia, J.) (plurality) (citations omitted); *see also Bass*, 404 U.S. at 348. "[E]qually important, it vindicates the principle that only the legislature may define crimes and fix punishments." *Whitman v. United States*, 135 S. Ct. 352, 354 (2014) (Scalia, J.,

respecting denial of certiorari); *see also Bass*, 404 U.S. at 348 ("[L]egislatures and not courts should define criminal activity."). Together, these two principles dictate that Congress "may not abdicate [its] responsibilities for setting the standards of the criminal law by leaving to judges the power to decide the various crimes includable in [a] vague phrase." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1227 (2018) (Gorsuch, J., concurring) (internal quotation marks and citations omitted)).

In sum, the rule of lenity recognizes that courts "do not play the part of a mindreader" and should "reject[] the impulse to speculate regarding a dubious congressional intent." *Santos*, 553 U.S. at 515 (Scalia, J.). Here, the lenity precept and its underlying rationales compel rejection of the Sixth Circuit's approach.

B. There is insufficient evidence of Congressional intent to eliminate the contemporaneous intent requirement to justify that dramatic change in the definition of burglary.

The crux of burglary has long been the intent to commit a crime at the time of entry. When commentators, legislatures, and courts began proposing the "remaining" alternative, it was presented as modifying the entry requirement, not the intent requirement. In the absence of clear evidence that Congress viewed it differently, the rule of lenity forbids interpreting the "remaining" language to eliminate the contemporaneous intent requirement.

1. Contemporaneous intent at entry has long been a defining characteristic of burglary.

As the Model Penal Code explained, the offense of burglary "probably resulted from an effort to compensate for defects of the traditional law of attempt." Model Penal Code § 221.1, cmt. 1 at 62-63. By "[m]aking entry with criminal intent an independent substantive offense," burglary "moved back the moment when the law could intervene in a criminal design." *Id.* at 63. Viewing burglary as an attempt workaround, it is clear that the intent to commit some future crime at the time of the trespass was the gravamen of the offense. *See also* Pet. Br. 12, 18-22.

This central aspect of the offense of burglary remained in place in the United States well into the 1970s and 1980s. The Brown Commission, for example, emphasized that entry with intent to commit a crime "displays a degree of deliberation and commitment to criminal action on the part of the culprit." II Working Papers, *supra*, at 892. And the Model Penal Code described "the objective or purpose that accompanies the entry" as one of the key elements of the offense. Model Penal Code § 221.1, cmt. 3 at 68.

As the D.C. Court of Appeals explained at the time, "[a] requisite element of proof in a prosecution under our burglary statute, *and those of most jurisdictions*, is that the defendant have an intent to steal or commit a crime at the time of entry." *Massey v. United States*, 320 A.2d 296, 299 (D.C. 1974) (em-

phasis added, citations omitted); *see also e.g., Commonwealth v. Tingle*, 419 A.2d 6, 9 (Pa. Super Ct. 1980); *Timmons v. State*, 500 N.E.2d 1212, 1215-16 (Ind. 1986).

2. "Remaining" was seen as modifying the entry element, not the intent element.

Commentators, legislatures, and courts discussing the "remaining" language in the 1970s and 1980s largely described it as an alternative form of trespass to satisfy what was historically the unlawful entry requirement, not as a way to eliminate the requirement of criminal intent at the time of trespass.

The Model Penal Code, for example, separated its discussion of burglary into four elements: "the nature of the entry, the place of entry, the objective or purpose that accompanies the entry, and a description of factors accompanying the entry that aggravate the degree of the offense." Model Penal Code § 221.1, cmt. 3 at 68. The "remaining" language was discussed as part of the first element, *id.* at 69-71, not the third element, *id.* at 75-78. And in a notable shift away from entry-centric language, the Model Penal Code's discussion of "criminal purpose" (i.e. intent) referred to criminal intent at the time of the "intrusion." *Id.* at 75. Similarly, the Brown Commission described the "remaining" alternative in a paragraph on whether burglary should be limited to unlawful entries or not. II Working Papers, *supra*, at 895. And LaFave & Scott explained that the "remaining" language was desirable because "[a] lawful entry does not foreclose the kind of intrusion burgla-

ry is designed to reach." 2 LaFave & Scott, *supra*, § 8.13(b), at 468.

Early state adopters of the "remaining" language described it in a similar fashion as an alternative to unlawful entry. For example, New York's highest court explained that "[t]he word 'remain' in the phrase 'enter or remain' is designed to be applicable to cases in which a person enters with 'license or privilege' but remains on the premises after the termination of such license or privilege." *People v. Licata*, 268 N.E.2d 787, 789 (N.Y. 1971). Illinois courts of appeals described their burglary statute in the same way. *See, e.g., People v. Tinkler*, 407 N.E.2d 985, 987 (Ill. App. Ct. 1980) (observing that remaining language "is aimed at a situation where a defendant lawfully enters a building and then conceals himself with the intent to commit a felony").

The same theme is apparent from Congressional reports. With respect to the Criminal Code Reform Act of 1981, which formed the basis for the definition of burglary in the Armed Career Criminal Act of 1984, entry and surreptitious remaining were described as bearing on the second element of burglary, traditionally that of entry. S. Rep. No. 97-307, at 650-51. Intent to commit a crime was a separate element, discussed in detail several paragraphs later. *Id.* at 652.

In sum, contemporaneous evidence shows that the "remaining" language was predominantly viewed in the 1980s as "broaden[ing] the definition of criminal trespass" to include unlawful remaining after a lawful entry, not as "eliminat[ing] the requirement

that the act constituting criminal trespass be accompanied by contemporaneous intent to commit a crime." *Gaines*, 546 N.E.2d at 915.

3. Congress did not suggest an intent to deviate from this consensus.

There is no evidence that Congress, in enacting ACCA, intended to eliminate the contemporaneous intent requirement rather than simply to expand the kind of criminal trespass giving rise to liability as burglary.

Elsewhere, where Congress intended to deviate from the common law definition of burglary, it expressly noted as much. *E.g.*, S. Rep. No. 98-190, at 20 ("[T]he common law definition of burglary includes a requirement that the offense be committed during the nighttime and with respect to a dwelling. However, for purposes of this Act, such limitations are not appropriate."). To be sure, Congress noted that its definition "expand[ed] the common law definition to include persons who remain surreptitiously within a dwelling," rather than limiting its reach to those whose entry was unlawful. S. Rep. No. 97-307, at 651. But Congress said nothing about understanding the "remaining" language to eliminate the requirement of contemporaneous intent at the time of the trespass and transform any crime committed while trespassing into a burglary. To the contrary, it took pains to make clear that *not* all crimes committed while trespassing were to be considered burglaries. *Id.* (one who is asked to leave, refuses, and threatens to punch his host in the nose has not committed burglary).

Nor was Congress "acting against [a] backdrop" where the dominant interpretation of the "remaining" language was to eliminate the contemporaneous intent requirement. *See Santos*, 553 U.S. at 513 (Scalia, J.). It appears that as of 1986, not a single state high court had construed the "remaining" language to have this effect. Pet. Br. 46-49.[5] By contrast, at least two state high courts had expressly rejected the notion that any crime committed while trespassing constituted burglary under their statutes' "remaining" language. *See id.* 31-32 (citing cases from Arkansas and Connecticut). And 21 states still limited burglary to unlawful entry with no "remaining" alternative *at all*. Pet. Br. 30-46 (citing statutes and cases from the District of Columbia, Idaho, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, and West Virginia).

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[5] While the Court of Criminal Appeals is the highest court for criminal matters in Texas, the language of Texas's burglary statute construed in *Day v. State*, 532 S.W.2d 302 (Tex. Crim. App. 1976) is unique. That provision had (and still has) three prongs: (1) unlawful entry with intent to commit a crime; (2) "remain[ing] concealed" unlawfully with intent to commit a crime; and (3) unlawful entry *followed by* commission of a crime. *See id.* at 305; *see also* Tex. Penal Code Ann. § 30.02(a) (West 1974). Subsection (3) clearly eliminates the contemporaneous intent requirement, but not through "remaining" language; *Day* had no occasion to consider the effect of that language.

From this, it is apparent that eliminating the contemporaneous intent element from burglary would have been bucking the trend dramatically. There is no indication that Congress intended to do so. Under the rule of lenity, "it would require statutory language much more explicit than that [present here] to lead to the conclusion that Congress intended" to eliminate such a deep-rooted and longstanding feature of the criminal law. *Williams v. United States*, 458 U.S. 279, 290 (1982) (quoting *Enmons*, 410 U.S. at 411).

C. Eliminating the contemporaneous intent requirement would lead to unjustified and draconian results.

The protections of the rule of lenity are all the more important here because of the dramatic consequences of an expansive interpretation of ACCA's predicate crimes. ACCA imposes a harsh 15-year mandatory minimum sentence on those convicted of being a felon in possession of a firearm with three or more prior convictions for enumerated offenses, including burglary. *See* 18 U.S.C. § 924(e)(1); *Taylor*, 495 U.S. at 581. Without a contemporaneous intent requirement, ACCA would make any crime committed while trespassing a predicate offense triggering a 15-year mandatory minimum.

Petitioner and the Courts of Appeals have given examples of the kinds of conduct this could sweep up: a homeless person seeking shelter from the cold who later takes food or a coat from inside a building; teenagers who break into a house to party but later decide to steal something from the house; a lost hik-

er who breaks into a cabin to keep warm and later takes food. Pet. Br. 55; *Herrera-Montes*, 490 F.3d at 392. These are not far-fetched hypotheticals; the reality is that defendants are prosecuted for burglary in similar circumstances in states that have dispensed with the contemporaneous intent requirement. *See, e.g., In re A.C.D.*, No. CA2014-06-085, 2015 WL 307842, at *1 (Ohio Ct. App. Jan. 26, 2015) (teenager prosecuted for juvenile equivalent of burglary after entering a house to see if it was the location of a planned party and eating snacks from the pantry); *State v. Walsh*, 789 P.2d 766, 767 (Wash. Ct. App. 1990) (teenager prosecuted for burglary for taking $10 and a coin collection from his mother's house after breaking in to take a shower and change his clothes[6]); *Evans v. State*, 653 S.E.2d 503, 504-06 (Ga. Ct. App. 2007), *rev'd on other grounds*, 673 S.E.2d 243 (Ga. 2009) (defendant prosecuted for burglary for stealing trinkets from an unoccupied house after seeking shelter there with his wife when their car broke down in the cold). Similarly, in states without a contemporaneous intent requirement, burglary prosecutions can arise from the kind of disputes between hosts and their guests that Congress deliberately intended to keep outside the bounds of burglary. *See supra* at 7-11. Under the Government's interpretation of ACCA, all of this conduct could

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[6] The teenager's conviction was subsequently reversed for reasons having nothing to do with contemporaneous intent: The Washington Supreme Court held that his mother violated her statutory obligation to provide for her minor child by kicking him out, rendering his later presence in the home lawful. *State v. Howe*, 805 P.2d 806 (Wash. 1991).

qualify as a predicate offense triggering a 15-year mandatory minimum sentence.

There is simply no justification for such draconian results. In the modern era, maintaining an independent burglary prohibition remains warranted because intrusion with an intent to commit a crime poses a risk above and beyond mere commission of the substantive offense. *See, e.g.*, S. Rep. No. 97-307, at 649. The "deliberation and commitment to criminal action" associated with burglary, II Working Papers, *supra*, at 892, is the same factor that motivated Congress to include burglary in its legislation targeting dangerous *career criminals* in the first place. Pet. Br. 51-54. Punishing mere crimes of opportunity committed while trespassing does not vindicate that interest and there is no reason or basis to stretch the statutory text to do so.

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At bottom, this Court must decide whether the "remaining" language is intended to "broaden the definition of criminal trespass" to include unlawful remaining after a lawful entry, or instead to "eliminate the requirement that the act constituting criminal trespass be accompanied by contemporaneous intent to commit a crime." *Gaines*, 546 N.E.2d at 915. Jettisoning what has always been a key feature of burglary—possession of contemporaneous intent to commit a crime at the time of trespass—based on Congressional silence and ambiguous language would disregard the history of the offense, violate the rule of lenity and its underlying purposes, and impose harsh results. There is nothing to suggest

that Congress intended such a break from the common understanding of burglary; in fact, the evidence is all to the contrary. This Court should not give such expansive meaning to a statutory term that need not be read in that way.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

Respectfully submitted,

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